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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

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Coordination Proceeding )  
Special Title (Rule 1550(b)). )  
In re TOBACCO CASES II )  
This Document Relates to: ) JCCP No. 4042  
The People of the State of )  
California, and American )  
Environmental Safety Institute ) DEPOSITION OF  
v. Philip Morris Incorporated, )  
et al., Los Angeles Superior ) BRUCE G. SILVERMAN  
Court, Case No. BC 194217 ) VOLUME I  
The People of the State of ) (Pages 1 - 185)  
California, City of San Jose, )  
and Paul Dowhall v. Brown & )  
Williamson Corp., et al., San )  
Francisco Superior Court, Case )  
No. 996781 )  
SERVICE LIST "B" )  
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TAKEN ON: Thursday, August 3, 2000  
TAKEN AT: 550 West C Street, Suite 1440  
San Diego, California  
REPORTED BY: Jeannette K. Jessup  
CSR No. 8573, RPR

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ALSO PRESENT: Michael Gold, AJL Videotaping

3

1 I N D E X

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4

1 C E R T I F I C A T E

2 I, the undersigned, do hereby certify that I have read  
3 the foregoing deposition and that, to the best of my  
4 knowledge, said deposition is true and accurate (with  
the exception of the following changes listed below):

Page	Line	Explanation
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BRUCE G. SILVERMAN

28

5

1 SAN DIEGO, CALIFORNIA; THURSDAY, AUGUST 3, 2000  
2 9:08 A.M.

3  
4 THE VIDEOGRAPHER: This is the videotaped 09:12:05  
5 deposition of Bruce Silverman, taken in re: Tobacco 09:12:05  
6 Cases II, in San Diego County Superior Court, Case 09:12:10  
7 Number JCCP 4042, held in the offices of Vail, 09:12:15  
8 Christians & Associates, 550 West "C" Street, Suite 09:12:25  
9 1440, in San Diego, California. Today is August 3rd, 09:12:30  
10 2000. The time is 9:12 a.m. 09:12:35  
11 My name is Michael Gold from the firm of AJL 09:12:39  
12 Videotaping Services, 1919 Grand Avenue, Suite 2C, 09:12:45  
13 in San Diego, and I am the videotape operator. The 09:12:48  
14 certified shorthand reporter is Jeannette Jessup with 09:12:52  
15 Vail, Christians & Associates. Video and audio 09:12:55  
16 recording will be taking place at all times during 09:12:59

17 this deposition unless counsel has specifically 09:13:02  
18 requested to go off the record. 09:13:05  
19 Counsel, will you please introduce yourselves 09:13:07  
20 for the record. 09:13:09  
21 MR. RICHARDSON: Tony Richardson, Kirkland & 09:13:11  
22 Ellis on behalf of Defendant Brown & Williamson 09:13:14  
23 Tobacco Corporation. 09:13:15  
24 MS. SHERIDAN: Stephanie Sheridan from 09:13:18  
25 Sedgwick Detert Moran & Arnold, also on behalf of 09:13:20  
26 Brown & Williamson. 09:13:22  
27 MS. MICHEL: Sidne Michel from Kirkland & 09:13:23  
28 Ellis, also on behalf of Brown & Williamson. 09:13:26

6

1 MR. KAPLAN: Bradley Kaplan from Allen, 09:13:29  
2 Matkins, Lecht, Gamble & Mallory for Lorillard Tobacco 09:13:30  
3 Company. 09:13:34  
4 MR. BERN: Martin Bern from Munger, Tolles & 09:13:36  
5 Olson for Philip Morris, Incorporated. 09:13:39  
6 MR. MILES: I'm Don Miles of the Howard, Rice 09:13:40  
7 firm for R.J. Reynolds Tobacco Company. 09:13:43  
8 MR. LENDRUM: Jeff Lendrum on behalf of 09:13:46  
9 Liggett Group. 09:13:48  
10 MR. HULBURT: Chris Hulburt for the plaintiff. 09:13:49  
11 THE VIDEOGRAPHER: The court reporter can now  
12 swear the witness.  
13

14 BRUCE G. SILVERMAN  
15 being first duly sworn, testified as follows:  
16

17 EXAMINATION BY MR. RICHARDSON:

18 Q. Good morning, Mr. Silverman. 09:14:06  
19 A. Good morning, Tony. 09:14:08  
20 Q. Sir, you're here today to provide expert 09:14:11  
21 testimony in this case; is that correct? 09:14:14  
22 A. That's correct. 09:14:18  
23 Q. Your deposition was taken as a person most 09:14:20  
24 knowledgeable for Western Initiative Media last week; 09:14:23  
25 is that correct? 09:14:27  
26 A. That's correct. 09:14:28  
27 Q. Do you have in mind the admonitions that Mr. 09:14:29  
28 Kaplan provided at that time, at the outset of the 09:14:31

7

1 deposition? 09:14:36  
2 A. I do. 09:14:36  
3 Q. Will you abide by those admonitions in this 09:14:37  
4 deposition? 09:14:40  
5 A. I will. 09:14:40  
6 Q. Were there any admonitions that Mr. Kaplan 09:14:41  
7 gave that you did not understand or did not work out 09:14:44  
8 to your satisfaction at the deposition last week? 09:14:46  
9 A. There weren't. 09:14:49  
10 Q. So to save us some time, I won't go through 09:14:50  
11 that litany. Mr. Silverman, what did you do to 09:14:54  
12 prepare for this deposition today? 09:14:59  
13 A. I reviewed various materials that was provided 09:15:03  
14 to me by the law firm for the plaintiffs, as well as 09:15:08  
15 the material that we prepared on behalf of the 09:15:16  
16 plaintiff's original attorneys, Preston Gates & Ellis. 09:15:20  
17 Q. What materials did you review that was 09:15:25  
18 provided by counsel for AESI? 09:15:27  
19 A. I provided the media -- I reviewed the media 09:15:31  
20 plan that was created by Western Initiative Media. 09:15:35  
21 That firm, by the way, is now called Initiative Media. 09:15:40

22 I reviewed some of the documents that supported that 09:15:45  
23 -- that plan. I reviewed quite a series of current 09:15:50  
24 advertisements for various tobacco products. I read 09:15:58  
25 through some of the depositions that had been taken in 09:16:06  
26 this case by other witnesses, and I read through 09:16:11  
27 various reports that went back a couple of years on 09:16:19  
28 the evaluation of the California tobacco use 09:16:25

8

1 prevention campaign that were prepared by USC. Some 09:16:29  
2 other miscellaneous documents. 09:16:37

3 Q. You mentioned reviewing some supporting 09:16:45  
4 documents for the media plan. When you say "media 09:16:48  
5 plan," what are you referring to? 09:16:51

6 A. Media plan is a document that was prepared by 09:16:53  
7 Western Initiative Media in July of 1999 that was a 09:16:59  
8 hypothetical plan to inform and advise the people of 09:17:04  
9 California of the dangers of environmental tobacco 09:17:10  
10 smoke, and to engender a change in public behavior as 09:17:14  
11 a result of being exposed to this advertising -- of 09:17:22  
12 the advertising that would run as a result of the 09:17:26  
13 plan. 09:17:27

14 A media plan is a blueprint for an advertising 09:17:30  
15 campaign for how media would be allocated -- how a 09:17:34  
16 budget would be allocated against different media 09:17:37  
17 forms to reach different target populations in an 09:17:40  
18 effective manner. 09:17:43

19 Q. You also mentioned reviewing supporting 09:17:44  
20 documents for that media plan. What supporting 09:17:47  
21 documents did you review? 09:17:50

22 A. There were only two or three. There was a -- 09:17:51  
23 a memorandum that I wrote that was given to the then 09:17:54  
24 head of the planning department at Western Initiative 09:18:00  
25 Media that very briefly outlined the assignment. 09:18:04  
26 There was a letter -- a letter from Preston Gates & 09:18:09  
27 Ellis to me. I think there might have been a letter 09:18:18  
28 from me to Preston Gates & Ellis. There was two or 09:18:19

9

1 three documents. 09:18:24

2 Q. Were there any other supporting documents, 09:18:25  
3 other than those you just mentioned, that you 09:18:26  
4 reviewed? 09:18:28

5 A. There was a -- there was a report that had 09:18:29  
6 been provided to us by Preston Gates & Ellis when they 09:18:32  
7 retained us to prepare the media plan, when they 09:18:37  
8 retained Initiative Media to prepare the plan. I 09:18:44  
9 looked at that. 09:18:44

10 Q. Can you describe the report that had been 09:19:00  
11 provided to you by Preston Gates & Ellis when -- when 09:19:03  
12 it retained you to prepare the media plan? 09:19:07

13 A. As I -- as I recall, it was a report on the 09:19:12  
14 results of the California program that was prepared by 09:19:17  
15 the group that was retained by the Department of 09:19:23  
16 Health Services to evaluate the -- the outcome of the 09:19:27  
17 campaign. 09:19:30

18 Q. Do you recall a title -- do you recall what 09:19:32  
19 that document was called? Did it have a title on the 09:19:35  
20 top -- 09:19:38

21 A. I don't recall.

22 Q. -- of the cover page? 09:19:39

23 A. I don't recall. 09:19:41

24 Q. Was the report that you just referenced a part 09:19:45  
25 of your expert file in this case? 09:19:48

26 A. Yes. 09:19:51

27 Q. You also mentioned reviewing current 09:19:54  
28 advertisements for tobacco products. What kind of 09:19:56

10

1 advertisements did you review in preparation for your 09:19:59  
2 deposition today? 09:20:02

3 A. There were a number of magazine advertisements 09:20:03  
4 for various cigarette brands, Marlboro, Virginia 09:20:11  
5 Slims, Camels. I believe there was a menthol brand, 09:20:15  
6 probably Newport. 09:20:23

7 Q. Why did you review current advertisements for 09:20:26  
8 tobacco products in preparation for your deposition 09:20:28  
9 today? 09:20:30

10 A. Mostly just to look at what's happening right 09:20:31  
11 now, what the tobacco industry is doing in their ads 09:20:36  
12 right now. It's just a refresher. I don't generally 09:20:41  
13 pay much attention to tobacco advertising in 09:20:46  
14 magazines. 09:20:48

15 Q. Why did you find it necessary to review the 09:20:50  
16 advertisements as a refresher? 09:20:52

17 A. I was asked to do so by -- by the plaintiff's 09:20:55  
18 attorneys. 09:20:58

19 Q. Did plaintiff's attorney ask you to do 09:21:02  
20 anything else, other than reviewing the current 09:21:04  
21 advertisements of tobacco products, in preparation for 09:21:10  
22 your deposition today? 09:21:13

23 A. They asked me to review the expert file that I 09:21:15  
24 believe has been provided to you. 09:21:17

25 Q. Anything else? 09:21:18

26 A. Show up here today. 09:21:20

27 Q. You also reviewed depositions of other 09:21:22  
28 witnesses you said that have been taken in this case; 09:21:25

11

1 is that correct? 09:21:28  
2 A. Briefly. 09:21:28

3 Q. What depositions did you review? 09:21:28

4 A. The deposition that I actually read most 09:21:30  
5 closely was the deposition of Andy Johnson. He's a 09:21:35  
6 professor at SC, and he was one of the lead 09:21:38  
7 investigators in doing the evaluation of the 09:21:46  
8 California program. I read through -- read through 09:21:48  
9 his deposition. 09:21:57

10 Q. Why did you review Professor Johnson's 09:21:58  
11 deposition? 09:22:02

12 A. I know him, so I was curious about it. 09:22:02

13 Q. But you expressly reviewed it for purposes of 09:22:05  
14 preparing -- for purposes of appearing here for a 09:22:08  
15 deposition today; is that correct? 09:22:11

16 A. Yes. 09:22:13

17 Q. Okay. Well, why did you review Professor 09:22:14  
18 Johnson's deposition for the sake of your deposition 09:22:18  
19 here today? 09:22:21

20 A. The media plan that was created was partially 09:22:23  
21 based on the experience of the California program. So 09:22:28  
22 any further insights I could get as to the 09:22:34  
23 effectiveness, or lack of same, of the California 09:22:38  
24 program would be helpful to me. And I assumed that 09:22:40  
25 Dr. Johnson's deposition might have some additional 09:22:45  
26 information that might prove useful. 09:22:48

27 Q. Had you reviewed Dr. Johnson's deposition 09:22:50  
28 prior to your review in preparation for your 09:22:54

12

1 deposition today? 09:22:56  
2 A. I'm not sure I understand the question. 09:23:01

3 Q. Was there any other time that you'd reviewed 09:23:04  
4 Dr. -- Professor Johnson's deposition testimony, other 09:23:06  
5 than for preparation of -- for your deposition here 09:23:10  
6 today? 09:23:13  
7 A. No. No. That was the only time. 09:23:14  
8 Q. What other depositions did you -- deposition 09:23:17  
9 transcripts did you review in preparation for the 09:23:21  
10 deposition today? 09:23:25  
11 A. I didn't -- didn't review others. I had 09:23:25  
12 received -- I believe I may have received some others, 09:23:27  
13 but I didn't read them. 09:23:30  
14 Q. Okay. So the only deposition testimony you 09:23:31  
15 reviewed for preparation for the deposition today was 09:23:32  
16 Dr. -- or I should say Professor Johnson's? 09:23:36  
17 A. That's correct. 09:23:38  
18 Q. You also mentioned reviewing various reports 09:23:43  
19 on the evaluation of the tobacco use prevention 09:23:45  
20 campaign. What reports were those, if you can recall? 09:23:47  
21 A. I don't recall the exact titles. 09:23:52  
22 Q. What were their nature? 09:23:55  
23 A. The -- it is my understanding that the 09:23:58  
24 Department of Health Services contracts with -- I 09:24:02  
25 believe it's with USC, though I know there are other 09:24:08  
26 organizations involved, to provide an annual 09:24:13  
27 evaluation of the tobacco use prevention campaign. 09:24:17  
28 And they issue periodic reports. I read at least one, 09:24:21  
13  
1 or more, of those reports. 09:24:26  
2 Q. Why did you review the reports on the 09:24:29  
3 evaluation of the tobacco use prevention campaign in 09:24:32  
4 preparation for your deposition today? 09:24:35  
5 A. I've been retained as an expert witness on the 09:24:40  
6 subject. So anything that would help me be able to 09:24:43  
7 provide insights as an expert would be useful. 09:24:46  
8 Q. For this deposition did you organize what I 09:24:52  
9 would call -- and if you call it something else, would 09:24:57  
10 you let me know -- your expert work file? 09:25:01  
11 A. Did I organize it? 09:25:06  
12 Q. Yes. 09:25:15  
13 A. No. 09:25:15  
14 Q. Did you ask someone under your charge to 09:25:15  
15 organize your expert work file for purposes of 09:25:15  
16 producing that material to defense counsel in this 09:25:15  
17 case? 09:25:19  
18 A. There was -- there were various materials that 09:25:20  
19 were in possession of Initiative Media, and that 09:25:22  
20 material was organized by my assistant and provided to 09:25:28  
21 the -- provided to the attorneys via our legal 09:25:34  
22 department, or the company's legal department 09:25:38  
23 organized it. It was the same material that was 09:25:40  
24 prepared for the deposition I gave last week. 09:25:43  
25 Q. Did you review the materials that Initiative 09:25:47  
26 Media's legal department prepared for purposes of 09:25:50  
27 producing to defendants in this case? 09:25:53  
28 A. Yes, I did. 09:25:57  
14  
1 Q. Okay. Was it a complete and full set of the 09:25:57  
2 materials that you relied upon for purposes of your 09:26:03  
3 expert work in this case? 09:26:07  
4 A. As far as materials, I think the answer would 09:26:15  
5 be correct. Materials that were in the possession of 09:26:18  
6 Initiative Media. There -- my expertise in this area 09:26:21  
7 and experience in this area precedes my employment 09:26:29



8 with Initiative Media. There may be other documents 09:26:32  
9 that were in the possession of my previous employer, 09:26:35  
10 which is now called Asher & Partners. It was then 09:26:40  
11 called Asher Gould. I don't know what they have, and 09:26:44  
12 I don't know what they provided, if any -- if ever 09:26:47  
13 asked to be provided. Don't know. 09:26:49  
14 Q. As you sit here today, are there any documents 09:26:51  
15 you're aware of that you relied upon for purposes of 09:26:53  
16 your expert work in this case that was not provided to 09:26:57  
17 counsel for AESI for purposes of producing to 09:27:01  
18 defendants in this case? 09:27:05  
19 A. I can't think of any specific documents. In 09:27:11  
20 the past decade I've read thousands of pages of 09:27:13  
21 material that -- you know, over the years. I don't 09:27:18  
22 have copies of everything. So I couldn't have 09:27:24  
23 provided it. 09:27:26  
24 Q. In response to an earlier question I asked, 09:27:28  
25 you mentioned that counsel for AESI had specifically 09:27:30  
26 asked you, I believe you said, to review either some 09:27:34  
27 of the supporting documents for the plan or some of 09:27:41  
28 the current advertisements. Did I get that correct? 09:27:43

15

1 A. They asked me to review current advertising 09:27:46  
2 for various tobacco products, and they also just 09:27:49  
3 simply asked me to review all of the material that was 09:27:53  
4 being gathered in response to the various subpoenas 09:27:56  
5 that have been received on this case. 09:28:00  
6 Q. Okay. Materials that were gathered -- I'm 09:28:02  
7 sorry -- in response to various subpoenas that have 09:28:03  
8 been received in this case; is that what you said? 09:28:07  
9 A. The material that was specifically asked for 09:28:10  
10 from Initiative Media, and then also some material 09:28:11  
11 that, you know, they provided that I didn't have 09:28:16  
12 before. 09:28:22  
13 Q. Just one second. 09:28:48  
14 A. Could I ask a favor. Could somebody just pass 09:28:56  
15 me a glass of water. Thank you. 09:28:59  
16 MR. MILES: Counsel, has -- has the witness's 09:29:10  
17 witness file been produced? 09:29:12  
18 MR. HULBURT: Yes. 09:29:13  
19 MR. MILES: Okay. How was it produced? 09:29:15  
20 MR. HULBURT: What do you mean "how"? 09:29:18  
21 MR. MILES: Well, I -- I don't know that I've 09:29:21  
22 gotten a copy of the whole witness file. There were 09:29:21  
23 several documents produced in his deposition last 09:29:24  
24 week, but it doesn't sound like his entire file. 09:29:25  
25 MR. HULBURT: I believe about --  
26 THE REPORTER: I'm sorry. It doesn't what?  
27 MR. MILES: It doesn't sound like it was his  
28 entire file.

16

1 MR. HULBURT: I believe about 10 inches or 09:29:32  
2 more of documents were produced, I think by letter to 09:29:34  
3 Stephanie Sheridan. 09:29:37  
4 MS. SHERIDAN: Actually, what happened was I 09:29:40  
5 talked to Karen at the end of last week, and she said 09:29:41  
6 they were planning to produce his file, but only to 09:29:43  
7 one attorney. And since I was going to be out of town 09:29:45  
8 preparing for Sharon Boyse's depo, it was sent to Tony 09:29:48  
9 Richardson. It arrived, I guess, on Friday. 09:29:52  
10 MR. MILES: Is it -- is it your practice only 09:29:58  
11 to produce it to one party in the case; is that your 09:30:00  
12 practice? 09:30:01

13 MR. HULBURT: I don't know what my practice 09:30:03  
14 is. I was not involved in the production of the 09:30:03  
15 documents for this witness. I understand they were 09:30:07  
16 produced, you know, well in advance of the 72-hour 09:30:09  
17 agreement. 09:30:16  
18 MR. MILES: To -- to one party. 09:30:20  
19 MR. HULBURT: I honestly don't know that. I 09:30:23  
20 accept that, you know, as she's described it. I 09:30:25  
21 accept that. 09:30:28  
22 MR. MILES: All right. All right. Thank you, 09:30:29  
23 counsel. 09:30:30  
24 MR. BERN: Do you happen to know offhand if 09:30:35  
25 there was a privilege log produced in conjunction with 09:30:37  
26 that production? 09:30:39  
27 MS. SHERIDAN: There was no privilege log.  
28 MR. HULBURT: I'm not aware of any privilege 09:30:40  
17  
1 log related to Mr. Silverman. 09:30:42  
2 MR. BERN: Thank you. 09:30:44  
3 MS. SHERIDAN: No privilege log was produced. 09:30:44  
4 MR. RICHARDSON: Let's go off the record for a 09:30:46  
5 second. 09:30:47  
6 THE VIDEOGRAPHER: One moment, please. Off 09:30:48  
7 the record at 9:30 a.m. 09:30:49  
8 (Discussion off the record.) 09:32:29  
9 THE VIDEOGRAPHER: We're back on the record at 09:33:00  
10 9:32 a.m. 09:33:02  
11 MR. RICHARDSON: Mr. Hulburt, I just wanted to 09:33:05  
12 follow up on I guess a question that Mr. Miles asked 09:33:11  
13 -- or it was Mr. Bern. Is it your intent to produce a 09:33:13  
14 privilege log in response to the documents that were 09:33:17  
15 provided as representing Mr. Silverman's expert work 09:33:19  
16 file? 09:33:23  
17 MR. HULBURT: I'm not aware of any privilege 09:33:25  
18 log related to Mr. Silverman. 09:33:26  
19 MR. RICHARDSON: Is it your intent to create 09:33:28  
20 one with respect to any documentation that was 09:33:29  
21 requested to be produced by Mr. Silverman at this 09:33:33  
22 deposition? 09:33:41  
23 MR. HULBURT: Not at this time. 09:33:41  
24 BY MR. RICHARDSON: 09:33:49  
25 Q. Mr. Silverman, I'm going to hand you -- 09:33:49  
26 MR. HULBURT: No. 09:34:01  
27 (Exhibit 839 was marked for identification.)  
28 ////  
18  
1 BY MR. RICHARDSON:  
2 Q. Mr. Silverman, I'm going to hand you and your 09:34:09  
3 counsel what has been marked as Exhibit 839. It's 09:34:12  
4 defendants' amended notice of taking -- 09:34:18  
5 MS. SHERIDAN: Do you want to use this one? BY 09:34:28  
6 MR. RICHARDSON:  
7 Q. -- amended notice of taking deposition of 09:34:33  
8 Bruce Silverman and request for production of 09:34:36  
9 documents. And ask you to review that at your 09:34:39  
10 leisure, and let me know when you're done. 09:34:47  
11 A. Yes, sir. 09:36:06  
12 Q. Have you seen what has been marked as Exhibit 09:36:07  
13 839 before, Mr. Silverman? 09:36:13  
14 A. Yes, I have. 09:36:16  
15 Q. Let me direct your attention to Exhibit A of 09:36:20  
16 Exhibit 839. It references documents which you were 09:36:27  
17 asked to produce in response to the deposition notice. 09:36:38

18 Do you see that? 09:36:43  
19 A. Yes, I do. 09:36:44  
20 Q. Under each of the Categories 1 through 5, did 09:36:46  
21 you provide counsel for AESI the documents referenced 09:36:50  
22 in Exhibit A? 09:36:55  
23 A. I provided all documents that I could provide. 09:36:59  
24 Q. And you did that through your charges at 09:37:03  
25 Initiative Media; is that correct? 09:37:06  
26 A. Yes. 09:37:09  
27 Q. Okay. Were there any documents which would 09:37:16  
28 fall under the categories listed in Exhibit A that 09:37:18

19

1 were withheld by Initiative Media, not provided to 09:37:21  
2 counsel for AESI? 09:37:25  
3 A. No. 09:37:27  
4 Q. Let me direct your attention to what has been 09:37:35  
5 marked -- well, as Exhibit 839, and Exhibit B of 09:37:38  
6 Exhibit 839. Do you see that? 09:37:42  
7 A. Exhibit B, yes. 09:37:44  
8 Q. Again, it lists four categories of documents 09:37:46  
9 which are subject to the subpoena attached to the 09:37:49  
10 deposition notice. Do you see that? 09:37:52  
11 A. Yes. 09:37:55  
12 Q. Did you provide all of the documents that are 09:37:56  
13 categorized in the four numbered listings to counsel 09:38:01  
14 for AESI in response to the deposition subpoena? 09:38:06  
15 A. Yes, I did. 09:38:11  
16 MR. HULBURT: Tony, let me just interject. On 09:38:17  
17 item --  
18 MR. RICHARDSON: Sure. 09:38:19  
19 MR. HULBURT: -- Number 4, which is rather 09:38:20  
20 broad and relates to this case, and, quote, any other 09:38:22  
21 client, I don't believe that Mr. Silverman has 09:38:27  
22 produced, and we've certainly not requested him to 09:38:29  
23 produce to us, any documents related to any work he's 09:38:32  
24 done for any other clients. 09:38:36  
25 BY MR. RICHARDSON: 09:38:44  
26 Q. Is your -- is Mr. Hulbert's representations, 09:38:44  
27 as you understand them, correct, Mr. Silverman? 09:38:49  
28 MR. HULBURT: It's Hulburt. 09:38:51

20

1 MR. RICHARDSON: Hulburt, I'm sorry. 09:38:52  
2 THE WITNESS: I believe we've supplied 09:39:00  
3 everything we had to supply. 09:39:02  
4 BY MR. RICHARDSON: 09:39:07  
5 Q. Mr. Silverman, do you maintain a separate file 09:39:31  
6 for your expert work in this case, separate and apart 09:39:34  
7 from any other work that you do? 09:39:38  
8 A. I have gathered a separate file specific to 09:39:43  
9 this case that is separate from other work I do. 09:39:47  
10 Everything that's in that file has been provided as -- 09:39:51  
11 as -- as requested. 09:39:58  
12 Q. And when you say "provided as requested," it 09:40:03  
13 was provided to counsel for AESI; is that correct? 09:40:05  
14 A. That's correct. 09:40:07  
15 Q. Mr. Silverman, I know at the deposition last 09:40:30  
16 week you discussed with Mr. Kaplan your education and 09:40:32  
17 work experience. I don't want to go over that in any 09:40:38  
18 detail. What I'd like to ask, however, as a follow up 09:40:41  
19 is for you to detail as completely you can your 09:40:45  
20 background in advertising. 09:40:51  
21 A. Okay. I got my first job in advertising in 09:40:55  
22 1967 at a firm called Ogilvy and Mather in New York 09:41:01

23 City. That's O-g-i-l-v-y M-a-t-h-e-r. I started out 09:41:07  
 24 as a messenger. I advanced within that firm, working 09:41:15  
 25 in the account service department handling -- doing 09:41:27  
 26 client relationship management, marketing work, media 09:41:31  
 27 work, creative work. Became a specialist on the 09:41:35  
 28 creative side of the business. I was advanced within 09:41:39  
 21

1 the firm, promoted to copywriter, then to copy 09:41:46  
 2 supervisor, then to associate creative director. 09:41:51  
 3 I became creative director and general manager 09:41:57  
 4 of Ogilvy and Mather's office in Houston, Texas, where 09:42:00  
 5 I ran the Shell Oil account on a worldwide basis, 09:42:05  
 6 among other accounts. I was then transferred to the 09:42:12  
 7 company's -- Ogilvy and Mathers' Los Angeles office, 09:42:16  
 8 where I served as general manager and executive 09:42:18  
 9 creative director managing the Mattel Toys account on 09:42:21  
 10 a worldwide basis, also supervising all of the 09:42:29  
 11 activities on what was then called the General Foods 09:42:34  
 12 kids cereal business. Products like Alpha Bits and 09:42:40  
 13 Pebbles cereal, and products like that. 09:42:46  
 14 I then was transferred back to New York, where 09:42:52  
 15 I was senior vice president and executive creative 09:42:55  
 16 director of Ogilvy and Mather New York. 09:43:00  
 17 I left Ogilvy and Mather in 1980, I think it 09:43:04  
 18 was. I joined a firm called Bozell and Jacobs, 09:43:14  
 19 B-o-z-e-l-l, where I was executive vice president, 09:43:17  
 20 executive creative director and general manager of 09:43:22  
 21 their southwest division, which included 09:43:25  
 22 responsibility for their offices in Dallas, Texas; 09:43:28  
 23 Houston, Texas; Atlanta, Georgia; Phoenix, Arizona and 09:43:36  
 24 Los Angeles. While at that agency I supervised the 09:43:36  
 25 activities of the American Airlines account, Armour 09:43:43  
 26 Foods, Greyhound Lines, Pace foods, MaryKay cosmetics, 09:43:47  
 27 Quaker Oats. 09:43:54  
 28 In 1984 I joined the advertising firm of BBDO, 09:43:58  
 22

1 "B" as in boy, "B" as in boy, "D" as in David, "O" as 09:44:07  
 2 in Oscar, which is an acronym for Batten Barton 09:44:10  
 3 Durstine and Osborn, in Los Angeles as executive vice 09:44:15  
 4 president/general manager of their West Coast 09:44:22  
 5 operations for Los Angeles and San Francisco. Headed 09:44:27  
 6 accounts there that included Coldwell Banker Real 09:44:33  
 7 Estate, Sizzler restaurants, Almaden Vineyards, Apple 09:44:38  
 8 Computers, the Worldwide Church of God. Even religion 09:44:45  
 9 advertises. 09:44:51  
 10 I left BBDO to join a small firm as a partner. 09:44:55  
 11 The firm was called Asher Gould. I was one of the 09:45:00  
 12 owners, I was president, I was chief operating 09:45:04  
 13 officer. At Asher Gould my account responsibilities 09:45:09  
 14 included the Pabst Brewing Company, Suzuki 09:45:16  
 15 Automobiles, Pizza Hut, Baskin Robbins ice cream, 09:45:22  
 16 Avery Dennison, Sun America -- 09:45:30  
 17 THE REPORTER: I'm sorry. Baskin Robbins ice 09:45:32  
 18 cream. 09:45:35  
 19 THE WITNESS: Baskin Robbins ice cream, Sun 09:45:32  
 20 America Insurance, the California Department of Health 09:45:35  
 21 Services for their tobacco use prevention campaign and 09:45:41  
 22 HIV prevention campaigns, among others. I worked 09:45:47  
 23 there for 11 years. I sold my interest in the company 09:45:53  
 24 to my partner, Mr. Asher, in 1986 -- excuse me -- 09:45:58  
 25 1997. 09:46:01  
 26 When I joined what was then called Western 09:46:01  
 27 International Media as executive -- well, actually my 09:46:06

28 initial title at the company was president of the 09:46:08

23

1 Western International Advocacy Group, which was a 09:46:12  
2 division of the company. My role there later 09:46:17  
3 expanded, and I became executive vice president and 09:46:20  
4 managing director of their Pacific region. The 09:46:26  
5 Pacific region includes all of the offices of the 09:46:31  
6 company from Denver to the Pacific Ocean, Denver, Salt 09:46:36  
7 Lake City, Portland, San Francisco, Sacramento, Los 09:46:42  
8 Angeles, San Diego, Phoenix, Las Vegas. I'm 09:46:45  
9 responsible for all of the operations in that part of 09:46:52  
10 the world. That includes our headquarters office. 09:46:56  
11 The major accounts of -- the company has 09:46:59  
12 nearly 1,000 accounts, I think. The major accounts 09:47:03  
13 I'm involved with are the Walt Disney Company, Carls 09:47:09  
14 Jr. Restaurants, Sysco Systems, E-trade, Albertsons 09:47:15  
15 markets, Circle K convenience stores, 76 gasoline, 09:47:26  
16 Arco, many others. In that capacity I manage a staff 09:47:33  
17 of approximately 1,000 people. And advertising 09:47:43  
18 companies measure their size by billings, and I'm 09:47:49  
19 responsible for about \$1-1/2 billion in business. 09:47:52  
20 BY MR. RICHARDSON:

21 Q. Your curriculum vitae, I noticed it makes 09:47:58  
22 reference to you being recognized as an expert on 09:48:07  
23 social marketing. 09:48:09  
24 A. Yes, that's correct. 09:48:10  
25 Q. Okay. What -- what does that mean, "social 09:48:11  
26 marketing"? 09:48:15  
27 A. Conventional marketing endeavors to sell goods 09:48:18  
28 and services. Efforts to -- to promote the sale or 09:48:21

24

1 use of goods and services. Social marketing uses the 09:48:26  
2 disciplines of marketing, advertising, public 09:48:30  
3 relations, et cetera, to affect social change, 09:48:32  
4 behavioral change in society. Good examples of it are 09:48:37  
5 campaigns related to drug use, related to tobacco use, 09:48:41  
6 related to alcohol abuse issues, related to teen 09:48:50  
7 pregnancy issues, et cetera. 09:48:59  
8 Q. Have you been involved in any campaigns 09:49:09  
9 related to affecting social change with respect to 09:49:11  
10 drug use? 09:49:15  
11 A. Yes, I have. 09:49:17  
12 Q. What campaigns are those? 09:49:18  
13 A. I've been involved in campaigns that were 09:49:20  
14 prepared for the Partnership for Drug Free America. 09:49:22  
15 Q. What timeframe are you referring to? At what 09:49:29  
16 time were you involved in such campaigns? 09:49:33  
17 A. It was -- well, the campaigns for the 09:49:35  
18 Partnership for Drug Free America campaigns would have 09:49:38  
19 been -- would have taken place during the period that 09:49:43  
20 I was at Asher Gould. 09:49:45  
21 Q. And what specifically did you do with respect 09:49:51  
22 to affecting social change by directing campaigns 09:49:52  
23 related to drug use? 09:49:59  
24 A. We developed various creative materials on a 09:50:00  
25 pro bono basis for the Partnership for Drug Free 09:50:04  
26 America. 09:50:08  
27 Q. When you say you "developed various creative 09:50:14  
28 materials," what do you mean? 09:50:17

25

1 A. Creative materials meaning television 09:50:18  
2 commercials, radio commercials, magazine 09:50:20  
3 advertisements, billboards. 09:50:23

4 Q. Advertising, in other words? 09:50:24  
5 A. Advertising. 09:50:25  
6 Q. With respect to your social marketing efforts 09:50:27  
7 concerning alcohol abuse, what have you done? 09:50:31  
8 A. The alcohol abuse programs were -- were 09:50:34  
9 actually done again on a pro bono basis. One of my 09:50:38  
10 clients at Asher Gould was the Pabst Brewing Company, 09:50:43  
11 and they asked us to develop some -- some advertising 09:50:46  
12 programs, again to run on a pro bono basis, to be 09:50:54  
13 provided to their distributors to use to be placed on 09:50:58  
14 a pro bono basis to promote the appropriate use of 09:51:00  
15 alcoholic beverage products. 09:51:05  
16 Q. And the goal of that effort was, again, to 09:51:08  
17 affect behavioral changes in society with respect to 09:51:18  
18 alcohol use? 09:51:18  
19 A. Yeah, promote the -- promote safe use of those 09:51:18  
20 products. 09:51:21  
21 Q. And your specific task was to provide 09:51:22  
22 advertising for that purpose -- 09:51:26  
23 A. That's correct.  
24 Q. -- is that correct? 09:51:27  
25 A. Yes. 09:51:28  
26 Q. With respect to teen pregnancy, what social 09:51:29  
27 marketing efforts have you been involved in? 09:51:32  
28 A. California -- the State of California 09:51:35

26

1 Department of Health Services has had a number of 09:51:37  
2 programs that have been involved in that issue, both 09:51:42  
3 paid and unpaid programs. I've advised the Department 09:51:49  
4 of Health Services on a -- again a pro bono basis on 09:51:55  
5 the most effective -- what I believe to be the most 09:52:00  
6 effective communication vehicles and methodologies for 09:52:02  
7 that messaging. 09:52:08  
8 Q. That's specifically with respect to the 09:52:10  
9 advertising; is that correct? 09:52:12  
10 A. I would extend that to include -- social 09:52:15  
11 marketing is not just advertising. Advertising is a 09:52:18  
12 component of marketing. My primary expertise is in 09:52:22  
13 advertising, but social marketing is a much broader 09:52:29  
14 subject. Most social marketing campaigns are, first 09:52:34  
15 and foremost, public relations efforts. Public 09:52:37  
16 relations in a very broad sense, meaning -- meaning 09:52:41  
17 community activities, community outreach programs, 09:52:48  
18 involvement with both the public sector, private 09:52:52  
19 sector and volunteer organizations that work in 09:52:55  
20 communities. Advertising in and of itself as a social 09:53:01  
21 marketing strategy, or tactic, rarely works. So to be 09:53:06  
22 an expert in social marketing, at least in my view, 09:53:11  
23 one must have a reasonable expertise across a number 09:53:15  
24 of marketing platforms, including public relations, 09:53:18  
25 community outreach, publicity, et cetera. 09:53:22  
26 So my involvement in any of the social 09:53:26  
27 marketing programs would have included advice and 09:53:29  
28 counsel and understanding of how the advertising 09:53:32

27

1 component would fit in and synchronize with other 09:53:36  
2 communication programs that were being used to affect 09:53:40  
3 social change. 09:53:44  
4 Q. The component that you brought to the table 09:53:46  
5 with respect to the social marketing programs, 09:53:46  
6 however, was with respect to your advertising 09:53:49  
7 expertise, correct? 09:53:53  
8 A. My primary component was advertising. In the 09:53:57

9 case of the tobacco use prevention campaign for the 09:54:02  
10 State of California, my very specific role, and my 09:54:07  
11 contractual role, was that of project director for the 09:54:11  
12 overall media campaign, which included both 09:54:16  
13 advertising and public relations. 09:54:19  
14 Q. You're referring now to your work with the 09:54:21  
15 Department of Health Services -- 09:54:24  
16 A. That's correct. 09:54:24  
17 Q. -- that you discussed at your deposition with 09:54:24  
18 Mr. Kaplan last week? 09:54:27  
19 A. I believe I did. 09:54:30  
20 Q. Okay. Last week you described yourself as an 09:54:37  
21 advertising strategist, do you recall that, with 09:54:40  
22 respect to the tobacco prevention media campaign? 09:54:44  
23 A. Yes. 09:54:48  
24 Q. What do you mean by that, that term, 09:54:48  
25 "advertising strategist"? 09:54:49  
26 A. In advertising terms, in advertising, strategy 09:54:52  
27 is defined very simply as who you're going to talk to, 09:54:56  
28 what are you going to say to them, how are you going 09:55:01

28

1 to say it. It's a pretty simple explanation, but 09:55:04  
2 making the decisions on how to get to the answers is 09:55:13  
3 fairly complex and takes a lot of experience, I think. 09:55:19  
4 And that's my primary role. I believe that you become 09:55:22  
5 good at it with time. Advertising expertise is 09:55:27  
6 generally gained by working on many, many, many 09:55:33  
7 different kinds of accounts. Many, many different 09:55:36  
8 kinds of products. Many -- trying to solve many, many 09:55:39  
9 different kinds of problems. And it -- your expertise 09:55:43  
10 is a result of a synthesis of all of the information 09:55:46  
11 that you've gained over the course of a career. 09:55:50  
12 Q. Mr. Silverman, do you have an understanding of 09:55:55  
13 what behavioral science is? 09:55:57  
14 A. I think I do. 09:56:02  
15 Q. What is your understanding of what behavioral 09:56:02  
16 science is? 09:56:04  
17 A. It's the study of how people -- how -- how 09:56:05  
18 people behave in a -- in a particular society or in a 09:56:15  
19 segment of that society. 09:56:18  
20 Q. Do you have any expertise with respect to 09:56:21  
21 behavioral science? 09:56:24  
22 A. No, I don't believe I do. 09:56:25  
23 Q. Do you have any work experience that would 09:56:30  
24 lend itself to developing an expertise in behavioral 09:56:32  
25 science? 09:56:37  
26 A. I'm an advertising person. 09:56:39  
27 Q. That would be "no," then? 09:56:43  
28 A. My expertise is how advertising can affect 09:56:48

29

1 behavioral change. To that extent, I'm an expert. If 09:56:51  
2 there is such a thing as a behavioral scientist, I 09:57:01  
3 don't claim to be one. 09:57:08  
4 Q. Do you have an understanding of what social 09:57:10  
5 science is? 09:57:13  
6 A. I believe I do. 09:57:14  
7 Q. What is your understanding of what social 09:57:15  
8 science is? 09:57:17  
9 A. Social science is understanding -- is an 09:57:18  
10 understanding of, again, how society plays its game 09:57:24  
11 out, how it reacts. It leads to people who are 09:57:29  
12 involved in social work and similar -- similar 09:57:33  
13 disciplines. 09:57:38

14 Q. Do you have any expertise with respect to 09:57:39  
15 social science? 09:57:41  
16 A. Again, only as advertising might affect it. 09:57:43  
17 Q. And -- and what do you mean by that, "only as 09:57:48  
18 to how advertising might affect it"? 09:57:50  
19 A. If a social scientist was to retain me, or a 09:57:52  
20 firm that I work with that I'm deeply involved in, to 09:57:58  
21 affect social change, I believe I could effectively 09:58:02  
22 help advise what advertising strategies and tactics 09:58:08  
23 might be appropriate to meet the objectives of -- of 09:58:21  
24 whatever their objectives are. But I'm certainly not 09:58:21  
25 a social worker or a social scientist in any formal 09:58:29  
26 manner. 09:58:33  
27 Q. Well, do you have any work experience that 09:58:34  
28 would lend itself to your developing expertise in 09:58:35

30

1 social science? 09:58:40  
2 A. Well, I certainly believe that the work 09:58:43  
3 experience that I have, particularly on social 09:58:44  
4 marketing assignments, has given me some insight into 09:58:49  
5 at least part of what social science is about. To 09:58:56  
6 create effective advertising programs, or to create 09:59:04  
7 effective social marketing campaigns, you have to 09:59:08  
8 study the society that you're trying to affect. And 09:59:14  
9 you have to study the effects of whatever the negative 09:59:21  
10 problem that you're trying to correct, how it works in 09:59:26  
11 that society. And you can take that society down to a 09:59:30  
12 macro or micro level. To that extent, I certainly 09:59:34  
13 have studied. 09:59:36  
14 Q. I'm sorry, sir. I guess I missed -- you 09:59:42  
15 certainly studied what? 09:59:45  
16 A. I certainly studied -- I'm sorry. You'll have 09:59:47  
17 to restate the question, and I'll try to give a better 09:59:52  
18 answer. 09:59:54  
19 Q. You mentioned that to some extent you have 09:59:55  
20 certainly studied, and I thought you hadn't completed 09:59:58  
21 your thought. And I was asking you, studied what? 10:00:03  
22 A. Well, studied societal -- societal -- behavior 10:00:05  
23 within both the society in general and then in certain 10:00:09  
24 subsegments of the society where there are various 10:00:13  
25 practices that the assignments I've worked on have 10:00:18  
26 engendered -- have attempted to change. An example 10:00:21  
27 would be tobacco use prevention. 10:00:27  
28 Q. Have you written any articles on the influence 10:00:30

31

1 of mass media on tobacco use? 10:00:33  
2 A. I wrote a monograph for the University of 10:00:40  
3 Florida Brain Institute. It was written in request -- 10:00:52  
4 as a result of a request by them, when they were 10:00:55  
5 putting together what I believe to be a -- it was 10:01:00  
6 either a proposal or a grant request for -- that was 10:01:06  
7 related to the settlement in the State of California, 10:01:13  
8 the tobacco settlement in the State of California -- 10:01:16  
9 excuse me, not in California -- in Florida. Florida. 10:01:18  
10 And they wanted something from me that gave my views 10:01:23  
11 on how to create successful tobacco use prevention 10:01:30  
12 campaigns. I don't recall writing any other articles. 10:01:34  
13 Q. Now, the Brain Institute monograph that you've 10:01:40  
14 referred to, was the subject of that monograph the 10:01:44  
15 influence of mass media on tobacco use? 10:01:47  
16 A. It included information on -- on that subject, 10:01:52  
17 yes. 10:01:58  
18 Q. What did you have to say about that subject? 10:01:58



19 A. Well, there were two sides to it. One was the 10:02:03  
20 practices of the tobacco industry in their marketing 10:02:05  
21 programs and what my suggestions were to counter the 10:02:10  
22 influence -- the marketing practices of the tobacco 10:02:14  
23 industry related to trying to promote the use of 10:02:17  
24 tobacco. Mass media is certainly included in that. 10:02:22  
25 But on a -- on a historical level and on a very 10:02:30  
26 current level. 10:02:34  
27 Q. Was the Brain Institute monograph a document 10:02:36  
28 that you provided to counsel for AESI for purposes of 10:02:40

32

1 producing in this case? 10:02:48  
2 A. Yes, I believe so. 10:02:48  
3 Q. Have you written any articles concerning the 10:02:49  
4 influence of mass media on smoking prevention? 10:02:52  
5 A. Other than the monograph? 10:02:57  
6 Q. Other than the monograph. 10:03:00  
7 A. I don't believe so. 10:03:01  
8 Q. And am I to assume, then, the monograph also 10:03:02  
9 dealt not only with tobacco use, but with smoking 10:03:07  
10 prevention? 10:03:09  
11 A. Yes. 10:03:09  
12 Q. Have you written any articles on the influence 10:03:14  
13 of educational programs on smoking prevention? 10:03:17  
14 A. No. 10:03:21  
15 Q. Have you conducted any research on the 10:03:25  
16 influence of mass media on tobacco use? 10:03:29  
17 A. Personally? 10:03:37  
18 Q. Yes. 10:03:37  
19 A. Not personally. But, yes, in my -- in my role 10:03:38  
20 as president of Asher Gould, I was involved in many 10:03:44  
21 research studies on that subject. 10:03:49  
22 Q. What were the research studies you were 10:03:53  
23 involved in as president of Asher Gould that related 10:03:54  
24 to research on the influence of mass media as to 10:03:56  
25 tobacco use? 10:04:00  
26 A. During the years I was at Asher Gould and 10:04:03  
27 involved very specifically on the Department of Health 10:04:06  
28 Services campaign, we conducted many focus group 10:04:09

33

1 sessions, qualitative research sessions and 10:04:15  
2 one-on-one interviews with various -- various people 10:04:18  
3 who were representative of various target audiences in 10:04:22  
4 the State of California. I did similar research -- I 10:04:28  
5 was involved in similar research in attempting to 10:04:31  
6 secure contracts for other tobacco use prevention 10:04:34  
7 campaigns in other states, as well as on the national 10:04:38  
8 level. And those -- some of those were actually 10:04:42  
9 during the period that I was working for Initiative 10:04:48  
10 Media. 10:04:50  
11 Q. Have you -- did you publish your -- the 10:04:51  
12 monograph that you created for the Brain Institute? 10:04:56  
13 A. I didn't publish it, no. 10:05:00  
14 Q. In what form did you present the monograph? 10:05:02  
15 A. Manuscript form. 10:05:06  
16 Q. To the University of Florida; is that correct? 10:05:09  
17 A. That's correct. 10:05:11  
18 Q. Mr. Silverman, have you won -- have you 10:05:20  
19 received any awards for your advertising work? 10:05:24  
20 A. Yes, many. 10:05:31  
21 Q. What -- what awards have you received for your 10:05:31  
22 advertising work? 10:05:31  
23 A. Over the course of my career? 10:05:34

24 Q. Yes. 10:05:34

25 A. Advertising is a -- is a funny industry. It's 10:05:38

26 an industry that -- that deals heavily in 10:05:41

27 self-congratulation. It goes far beyond the 10:05:44

28 entertainment industry in that regard, and the 10:05:54

34

1 entertainment industry is pretty good at it. I have 10:05:54

2 won Cleo awards. I have won what are called the One 10:05:58

3 Show award. I have won Belding awards. I have won 10:06:03

4 Cannes Gold Lion advertising awards. I've won 10:06:09

5 international awards, national awards, local awards by 10:06:14

6 various organizations that give out awards. 10:06:19

7 Q. What are these awards? Just generally, 10:06:22

8 without -- 10:06:23

9 A. Typically, advertising agencies submit their 10:06:28

10 work, the work that they believe is worthy, to various 10:06:33

11 award competitions that are held on both -- everything 10:06:37

12 from a local, to a regional, to a national, to an 10:06:41

13 international level. The typical process of these 10:06:44

14 award competitions is that an expert jury is 10:06:47

15 recruited. The expert jury generally consists of very 10:06:51

16 senior and very experienced and award-winning 10:06:57

17 advertising professionals from both the agency 10:07:01

18 business, as well as from client organizations, that 10:07:04

19 is, advertisers who review the advertising, and using 10:07:07

20 whatever criteria the specific award competition calls 10:07:12

21 for, decides which advertising stands out and wins 10:07:16

22 awards. Sometimes those award competitions are very 10:07:22

23 specifically based on the performance of the 10:07:27

24 advertising, the results that the advertising achieve. 10:07:30

25 Sometimes the awards are given really very 10:07:34

26 subjectively, based on somebody says, "Gee whiz, that 10:07:38

27 was a great idea. That was wonderfully well 10:07:42

28 executed." 10:07:45

35

1 I've been in this business more than 30 years. 10:07:46

2 I've won literally hundreds of awards for campaigns 10:07:48

3 for very large advertisers, very small advertisers, as 10:07:53

4 well as for advertising that relates very specifically 10:07:57

5 to today's deposition. 10:08:02

6 Q. What awards have you won relating to your work 10:08:06

7 on tobacco prevention campaigns? 10:08:10

8 A. There have been, as I recall -- I don't -- 10:08:17

9 sorry, I can't be more specific. I don't pay much 10:08:23

10 attention to these things. I just frankly don't think 10:08:26

11 they're very meaningful. And maybe I've just been 10:08:29

12 around too long and I'm jaded. But the advertising 10:08:32

13 has won awards from various award competitions in the 10:08:36

14 State of California, such as the Belding awards, which 10:08:42

15 is a competition for the best advertising created in 10:08:46

16 the Los Angeles advertising community, up to 10:08:49

17 international awards, from the Cannes International 10:08:54

18 Advertising Festival. The -- I don't even remember 10:09:00

19 the names of these things. I'm sorry. Just lots of 10:09:04

20 awards. And when I say "I" won the work that I was 10:09:07

21 associated with won, doesn't necessarily have my name 10:09:11

22 on it. I don't -- I stopped entering these things as 10:09:17

23 an individual many, many years ago. 10:09:20

24 Q. Well, thinking about the work which you've 10:09:24

25 been associated for which awards were received, what 10:09:26

26 awards related to work that you've done with respect 10:09:30

27 to tobacco prevention? 10:09:35

28 A. To the best of my knowledge, there have been 10:09:39

1 awards -- there have been Belding awards, there have 10:09:40  
 2 been Cannes awards, there have been One Show awards, 10:09:43  
 3 there have been New York Art Director Show awards, and 10:09:47  
 4 others. 10:09:49  
 5 Q. Well, then, what I'd like you to do is focus 10:09:50  
 6 on a specific campaign, or a specific ad even. Do you 10:09:52  
 7 have something in mind for which you've won an award 10:09:57  
 8 as a result? 10:10:00  
 9 A. There's a television commercial that was 10:10:00  
 10 prepared for the California Department of Health 10:10:03  
 11 Services called "Victim Wife." That commercial won a 10:10:05  
 12 number of awards. 10:10:12  
 13 Q. Okay. What award did the commercial "Victim 10:10:13  
 14 Wife" win? 10:10:17  
 15 A. I don't remember specifically. 10:10:17  
 16 Q. Do you remember why it won an award? Was it 10:10:20  
 17 for creativity? 10:10:25  
 18 A. I would assume it was won for creativity. 10:10:29  
 19 Q. Then the only specific award that you can 10:10:35  
 20 recall for work with -- that you've been associated 10:10:36  
 21 concerning tobacco prevention is the "Victim's Wife"? 10:10:41  
 22 A. No, there have been others. There were awards 10:10:45  
 23 -- I know that a billboard -- for example, a billboard 10:10:48  
 24 -- a billboard that featured two cowboys, one of whom 10:10:59  
 25 was complaining about having contracted emphysema, won 10:11:09  
 26 awards. Billboards on a headline "Do you believe 10:11:14  
 27 secondhand smoke knows to stay in the smoking 10:11:23  
 28 section?" won awards. Television commercials called 10:11:25

1 -- a television commercial that featured -- I think 10:11:35  
 2 it's called "Who are you going to believe?" won 10:11:42  
 3 awards. A commercial called "Nicotine Sound Bites" 10:11:46  
 4 won awards. I don't remember the specific awards that 10:11:59  
 5 each one won. As I said, it's not something that I 10:12:03  
 6 find tremendously meaningful. 10:12:07  
 7 Q. With respect to each of the awards you've just 10:12:10  
 8 listed, did you have the same general role with 10:12:12  
 9 respect to the work that was done? 10:12:16  
 10 A. My -- my role -- my specific role varied from 10:12:20  
 11 piece -- from advertising to advertising. As 10:12:24  
 12 president of the advertising agency, and as project 10:12:31  
 13 director on the -- on the contract, my role was a 10:12:33  
 14 broad one. I was -- I had overall responsibility for 10:12:37  
 15 all aspects of the work that was done by the agency 10:12:41  
 16 and its subcontractors. To that regard, I was deeply 10:12:45  
 17 involved in strategic development. I was sometimes 10:12:50  
 18 involved in conceptualizing advertising. I was 10:12:58  
 19 sometimes involved in specifically writing 10:13:02  
 20 advertising, very specifically. In essence, crafting 10:13:04  
 21 an ad or a commercial. Sometimes helping improve it 10:13:07  
 22 by offering suggestions. Sometimes approving it. 10:13:12  
 23 Sometimes killing ideas. So it varied from ad to ad. 10:13:18  
 24 The commercial called "Who Are You Going to 10:13:26  
 25 Believe?" I wrote myself. The commercial called 10:13:28  
 26 "Nicotine Sound Bites" I wrote myself. The billboard 10:13:33  
 27 on secondhand smoke, "Do you know" -- "Does Secondhand 10:13:42  
 28 Smoke Know to Stay in the Smoking Section?" which I 10:13:47

1 think is the title -- I could be incorrect, I think 10:13:50  
 2 it's pretty close to that -- I wrote. I was very 10:13:52  
 3 involved in the commercial called "Victim Wife." In 10:13:56  
 4 fact, the actor in it, that's -- the actor in it 10:14:09

5 happened to be a friend of mine. That's a true story, 10:14:14  
6 it's his story. So I simply took the story that I 10:14:16  
7 knew and asked him to tell it in front of a camera. I 10:14:22  
8 didn't write anything. 10:14:25  
9 Q. Have you -- have you published any articles on 10:14:27  
10 the influence of mass media on smoking prevention? 10:14:34  
11 A. No. I have certainly been interviewed by any 10:14:40  
12 number of trade magazines and by scholars who are 10:14:46  
13 investigating that issue. And I -- you know, either 10:14:56  
14 the information I gave may have been useful in -- in 10:15:01  
15 developing those articles, or I may have been quoted. 10:15:07  
16 But, no, I -- I don't write articles for a living. 10:15:11  
17 It's not my job. 10:15:15  
18 Q. Let's focus on the expert work you've done in 10:15:17  
19 this case. When were you hired as an expert in this 10:15:20  
20 case? 10:15:25  
21 A. I believe I was contacted in June of 1999. I 10:15:29  
22 may have been contacted before that, but it would have 10:15:39  
23 been on or around June of 1999. 10:15:41  
24 Q. By whom were you contacted? 10:15:44  
25 A. I was contacted by an attorney named Roger 10:15:45  
26 Carrick from the law firm of Preston Gates & Ellis in 10:15:50  
27 Los Angeles. 10:15:54  
28 Q. When were you ultimately retained as an expert 10:15:58  
39  
1 in this case? 10:16:02  
2 A. I believe it was June or July of 1999. 10:16:04  
3 Q. Who -- who hired you? 10:16:10  
4 A. Preston Gates & Ellis. 10:16:12  
5 Q. What agreement did you have with Preston Gates 10:16:18  
6 & Ellis with respect to how much you'd be paid as an 10:16:22  
7 expert in this case? 10:16:24  
8 A. I would be paid \$300 an hour for my expert 10:16:28  
9 testimony and for preparation time involved in that. 10:16:35  
10 There was a somewhat lower fee discussed for, you 10:16:41  
11 know, travel time. For example, to come to -- 10:16:45  
12 although that was discussed later with current 10:16:50  
13 counsel. With travel time to get to this deposition. 10:16:52  
14 The other agreement was, very specifically, that 10:16:57  
15 Preston Gates & Ellis would pay Western Initiative 10:17:01  
16 Media to prepare the proposed media -- proposed media 10:17:07  
17 plan. And that fee was -- I believe that was \$10,000 10:17:11  
18 for the plan. 10:17:16  
19 Q. Did you enter into any agreements with AESI 10:17:29  
20 with respect to your expert work in this case? 10:17:34  
21 A. Only as it would have been through counsel. 10:17:39  
22 Q. You mentioned present arrangements with -- I 10:17:43  
23 believe you're referring to the Thorsnes firm, current 10:17:47  
24 counsel for AESI? 10:17:50  
25 A. That's correct. 10:17:52  
26 Q. What agreement have you entered into with the 10:17:52  
27 Thorsnes firm, if any, with respect to your expert 10:17:55  
28 work in this case? 10:17:58  
40  
1 A. It's a continuation of the agreement that I 10:17:59  
2 entered into with Preston Gates. 10:18:00  
3 Q. And what specifically are those terms? 10:18:04  
4 A. \$300 an hour for testimony and for preparation 10:18:07  
5 for testimony. If I recall, I think it's \$250 an hour 10:18:11  
6 for travel time for out of town, or out of Los 10:18:16  
7 Angeles, meetings, such as this one. 10:18:24  
8 Q. Have you submitted any bills or invoices to 10:18:26  
9 the Preston Gates firm with respect to your expert 10:18:30

10 work in this case? 10:18:34  
11 A. Yes, I have. 10:18:36  
12 Q. Have you been paid for your expert work in 10:18:38  
13 this case, at least with respect to the bills and 10:18:40  
14 invoices you submitted thus far? 10:18:42  
15 A. Yes, to Preston Gates. 10:18:44  
16 Q. How much have you submitted by way of bills 10:18:50  
17 and invoices to the Preston Gates firm with respect to 10:18:53  
18 your expert work in this case? 10:18:56  
19 A. I believe I submitted bills for \$900 to 10:19:00  
20 Preston Gates for myself, and a bill for \$10,000, 10:19:08  
21 which came from Western Initiative, to Preston Gates 10:19:11  
22 for the preparation of the media plan. 10:19:16  
23 Q. Have you submitted any bills or invoices to 10:19:17  
24 the Thorsnes firm concerning your expert work in this 10:19:21  
25 case? 10:19:25  
26 A. Not yet. 10:19:25  
27 Q. Did you have the agreement with the Preston 10:19:48  
28 and Gates firm memorialized in a letter? 10:19:51

41

1 A. Yes, there was a letter. There are actually 10:19:58  
2 two letters. One was a letter from -- if I recall 10:20:02  
3 correctly -- from Preston Gates outlining the terms of 10:20:08  
4 the engagement, and then there was a second letter 10:20:17  
5 from me to Roger Carrick in which I corrected the 10:20:17  
6 rate. The original rate quoted was -- was changed. 10:20:21  
7 Q. Were those letters provided to counsel for 10:20:26  
8 AESI for purposes of production in this case? 10:20:31  
9 A. Yes, they were. 10:20:34  
10 (Exhibit 840 was marked for identification.)  
11 BY MR. RICHARDSON:  
12 Q. I am now handing you what will be marked as 10:20:35  
13 Exhibit 840. I would ask you to review it and let me 10:21:16  
14 know when you're done. Are you done, sir? 10:21:24  
15 A. Yes, I am. 10:23:11  
16 Q. Okay. Exhibit 840 is a document which appears 10:23:11  
17 to be a letter dated June 16, 1999 bearing Bates stamp 10:23:18  
18 numbers PX-BS-000005 through 000008; is that correct, 10:23:22  
19 sir? 10:23:32  
20 A. That's the document you've given me. It's out 10:23:34  
21 of order as marked. And is -- it only includes title 10:23:39  
22 pages on the position paper document and the draft 10:23:48  
23 preliminary injunction. 10:23:55  
24 Q. Is Exhibit 840 one of the letters that you 10:23:57  
25 referenced that you received from counsel for AESI at 10:24:03  
26 the -- at the outset of your retention for this case? 10:24:08  
27 A. Yes. 10:24:12  
28 MR. HULBURT: I want to just make the record 10:24:16

42

1 clear, that Bates Number 5 and 7 are the letter. 6 10:24:19  
2 and 8 are from other documents unrelated to the 10:24:23  
3 letter. 10:24:26  
4 MS. SHERIDAN: They're related to the letter. 10:24:30  
5 MR. RICHARDSON: Well, I -- I think that's a 10:24:31  
6 misstatement. 10:24:32  
7 MR. HULBURT: But they're -- I mean, they're 10:24:33  
8 -- they're not in order in the letter obviously. I 10:24:33  
9 mean the letter is 5 and 7. 10:24:36  
10 MS. SHERIDAN: Right.  
11 MR. RICHARDSON: Right.  
12 MR. HULBURT: 6 and 8 are maybe copies of what 10:24:37  
13 were attached to the letter, or enclosed with the 10:24:42  
14 letter. 10:24:44

15 MR. RICHARDSON: I think that's consistent 10:24:45  
16 with what Mr. Silverman stated. 10:24:46  
17 MR. HULBURT: All right. 10:24:49  
18 MR. RICHARDSON: But the record should also 10:24:49  
19 reflect this is the manner in which we received it, 10:24:51  
20 having been sent from your office. 10:24:55  
21 MR. HULBURT: I see the numbers on it. 10:24:56  
22 BY MR. RICHARDSON:  
23 Q. Okay. Mr. Silverman, let me direct you to 10:24:58  
24 what is page 2 of the letter, which is a part of 10:25:02  
25 Exhibit 840. And the first statement, it reads, "As 10:25:06  
26 we discussed, I shall forward to you a formal retainer 10:25:11  
27 agreement by which to retain you as an expert 10:25:15  
28 consultant in this matter at the rate of \$1,000 per 10:25:18  
43  
1 day, or \$125 per hour, based on an eight-hour 10:25:21  
2 workday." Do you see that? 10:25:26  
3 A. I do. 10:25:29  
4 Q. Did you receive at some point after June 16, 10:25:29  
5 1999 a formal retainer agreement from the Preston 10:25:32  
6 Gates firm concerning your expert retention in this 10:25:36  
7 case? 10:25:39  
8 A. I don't know. 10:25:39  
9 Q. You may have? 10:25:41  
10 A. I may have. I don't have a copy of it. 10:25:43  
11 Q. Do you have any specific recollection of 10:25:46  
12 having received a formal retainer agreement from the 10:25:48  
13 Preston Gates firm? 10:25:51  
14 A. I don't recall. 10:25:53  
15 Q. Now, as I understood your earlier testimony, 10:25:57  
16 you're being compensated at a rate of \$300 per hour? 10:26:00  
17 A. That's correct. 10:26:05  
18 Q. The reference, again on page 2 of the letter 10:26:05  
19 that's a part of Exhibit 840, to your being paid \$125 10:26:09  
20 per hour is then incorrect? 10:26:13  
21 A. Yes. As I previously stated, subsequent to 10:26:16  
22 this letter I sent a letter back saying that I had 10:26:19  
23 miscalculated what I needed the rate to be, and sent 10:26:25  
24 them a letter stating that the rate would be \$300 an 10:26:32  
25 hour. There was, as I recall, a telephone 10:26:36  
26 conversation with Roger Carrick in which he agreed to 10:26:40  
27 that rate. 10:26:44  
28 Q. When did you first begin working as an expert 10:26:50  
44  
1 in this case? 10:26:53  
2 A. In June of 1999. 10:26:59  
3 Q. What exactly were you retained to do as an 10:27:19  
4 expert in this case? 10:27:24  
5 A. I was retained to advise the plaintiff's 10:27:30  
6 counsel in two broad areas. One was -- actually three 10:27:35  
7 broad areas. One, as a general advertising expert; 10:27:40  
8 two, as an expert in tobacco use prevention 10:27:44  
9 advertising and social marketing related to that 10:27:49  
10 subject; and, third, and very specifically, the 10:27:53  
11 initial assignment was the preparation of a media plan 10:28:00  
12 to warn the people of the state of California about 10:28:08  
13 environmental tobacco smoke and to get them to change 10:28:13  
14 their behavior. People who did smoke or people who 10:28:19  
15 were around smokers, to change their behavior 10:28:25  
16 regarding that problem. 10:28:27  
17 (Exhibit 841 was marked for identification.)  
18 BY MR. RICHARDSON:  
19 Q. Let me give you what's now being marked as 10:28:31

20 Exhibit 841 and ask you to review that as well. 10:28:36  
21 A. Yes, sir. 10:30:12  
22 Q. Do you recognize, Mr. Silverman, what has been 10:30:15  
23 marked as Exhibit 841? 10:30:19  
24 A. Yes. 10:30:21  
25 Q. What do you recognize it as being? 10:30:22  
26 A. I recognize it as being a designation of 10:30:26  
27 expert witnesses for the plaintiffs. 10:30:31  
28 Q. Let me direct you to what is page 4 of Exhibit 10:30:34  
45  
1 841, specifically to Section 3B. Do you see that? 10:30:38  
2 A. Yes. 10:30:49  
3 Q. It reads, "Mr. Silverman expected to testify 10:30:50  
4 regarding the design, preparation, implementation of a 10:30:52  
5 public relations campaign that will provide California 10:30:57  
6 citizens and residents with clear and reasonable 10:31:00  
7 warning about their exposure to environmental tobacco 10:31:02  
8 smoke as compared to existing public relations type 10:31:06  
9 campaigns, and the cost of implementing such a 10:31:08  
10 campaign on an annual basis." Is that your 10:31:11  
11 understanding of your retention in this case? 10:31:15  
12 A. No, there's a typo. 10:31:17  
13 Q. The typo being? 10:31:26  
14 A. The typo being "public relations" instead of 10:31:26  
15 "advertising." "Design, preparation" on line 17. I 10:31:29  
16 suppose, you know -- I mean, I certainly -- you know, 10:31:36  
17 as I said earlier in this deposition, advertising in 10:31:39  
18 the context of social marketing campaigns is part of 10:31:45  
19 an overall public relations effort. But my expertise, 10:31:49  
20 and I expect my testimony, would be related to the 10:31:53  
21 advertising component of that campaign as opposed to 10:31:56  
22 the more narrow public relations aspect of it, which I 10:31:59  
23 don't -- which I am not as qualified an expert on as 10:32:04  
24 certainly Lynn Doll is. 10:32:08  
25 Q. So the caveat is that you -- your 10:32:11  
26 understanding is you're being retained as stated at 10:32:13  
27 Paragraph 3B on page 4, but for the reference to 10:32:17  
28 "public relations," correct? 10:32:21  
46  
1 A. Yeah. If you substitute the word 10:32:24  
2 "advertising" for the words "public relations," I 10:32:27  
3 think that's an accurate statement. 10:32:28  
4 Q. Again directing your attention to what is 10:33:01  
5 Paragraph 3B on page 4, what does it mean, the 10:33:03  
6 expression "as compared to existing public relations 10:33:10  
7 type campaigns," what is your understanding of that 10:33:13  
8 phrase? 10:33:18  
9 A. My understanding is that there have been 10:33:19  
10 various tobacco use prevention campaigns that have 10:33:22  
11 incorporated -- incorporated the issue of 10:33:26  
12 environmental tobacco smoke into them. Very 10:33:33  
13 specifically, this -- my testimony would be about how 10:33:35  
14 well those campaigns have done, or not done, in this 10:33:40  
15 state, and what might be done to achieve a better 10:33:45  
16 result. 10:33:52  
17 MR. RICHARDSON: We've been going for more 10:34:01  
18 than an hour. This might be an appropriate time for a 10:34:03  
19 break. 10:34:05  
20 THE VIDEOGRAPHER: One moment. Off the record 10:34:06  
21 at 10:33 a.m. 10:34:07  
22 (Recess taken.) 10:54:02  
23 THE VIDEOGRAPHER: We're back on the record at 10:54:11  
24 10:54 a.m. 10:54:12

25 MR. RICHARDSON: I'd like to deal with just 10:54:16  
 26 one formality before eliciting more testimony. I have 10:54:17  
 27 -- and, Mr. Hulburt, you're more than welcome to take 10:54:24  
 28 a look and confirm -- but I have what was presented as 10:54:28  
 47

1 Mr. Silverman's witness file, expert witness file, 10:54:32  
 2 which was produced to us in response to the notice for 10:54:36  
 3 deposition. It -- as the cover letter indicates -- 10:54:40  
 4 the cover letter is dated July 27th, 2000. It 10:54:47  
 5 includes Bates stamped documents PX-BS-000001 through 10:54:51  
 6 000694. 10:55:00  
 7 And, in addition, it includes documents that 10:55:05  
 8 are Bates stamp numbered C-IR-000001 through 0056, 10:55:08  
 9 which is referenced as "Internet information." Then 10:55:21  
 10 another set of Bates stamp numbers ALF-000001 through 10:55:25  
 11 0023, which is referenced as "American Legacy 10:55:33  
 12 Foundation information." Another set of Bates stamp 10:55:39  
 13 numbers, C-IR-RJR-00347. And a last set of Bates 10:55:41  
 14 stamp numbers -- and I should have added that those 10:55:53  
 15 Bates stamp numbers reference "RJR Web page 10:55:55  
 16 information." The last set of Bates stamp numbers are 10:56:00  
 17 as follows: C-IR-BW 000003-0011, 0092-0093, 10:56:02  
 18 0698-0699, 0710-0712, 0758-0759, 0938-0941, 0954-0961, 10:56:16  
 19 1393-1406 and 1435-1438. And those Bates stamp 10:56:33  
 20 numbers reference "B&W's Web page information." 10:56:42  
 21 (Exhibit 842 was marked for identification.)  
 22 MR. RICHARDSON: Chris, you're more than 10:56:47  
 23 welcome to take a look at that -- this and confirm the 10:56:48  
 24 production. But what I'd like to do is have this 10:56:51  
 25 marked as now Exhibit 842, the entire set of 10:56:54  
 26 documents. Chris, do you want to see these? 10:56:59  
 27 MR. HULBURT: To -- to -- to what end? What 10:57:09  
 28 are you -- what are you wanting me to confirm? 10:57:12  
 48

1 MR. RICHARDSON: No, if you --  
 2 MR. HULBURT: That the numbers you read are -- 10:57:13  
 3 MR. RICHARDSON: That the --  
 4 MR. HULBURT: -- numbers? 10:57:15  
 5 MR. RICHARDSON: That those are the documents. 10:57:15  
 6 MR. HULBURT: We produced documents by letter 10:57:17  
 7 on July 28th. We produced additional documents by 10:57:20  
 8 letter on July 28th. I think we also produced other 10:57:23  
 9 documents on July 27th. We may have produced some 10:57:27  
 10 documents on July 29th. I don't -- I didn't keep 10:57:31  
 11 track of all the numbers that you read -- 10:57:35  
 12 MR. RICHARDSON: Okay.  
 13 MR. HULBURT: -- to know whether those are all 10:57:36  
 14 the documents, but -- 10:57:37  
 15 MS. SHERIDAN: Actually, the document numbers 10:57:39  
 16 that he read I believe are just in the transmittal 10:57:39  
 17 letter -- 10:57:43  
 18 MR. RICHARDSON: Yes.  
 19 MS. SHERIDAN: -- from Karen Frostrom, and 10:57:43  
 20 that's what's laid out as to what's being produced. 10:57:46  
 21 And I believe there's only one production. 10:57:48  
 22 MR. RICHARDSON: There's only one production. 10:57:51  
 23 Chris, you mentioned a July 28th production. 10:57:51  
 24 MR. HULBURT: Correct.  
 25 MR. RICHARDSON: Is that -- was that with 10:57:55  
 26 respect to Mr. Silverman's expert work in this case? 10:57:55  
 27 MR. HULBURT: Sure. Sure. There's a letter  
 28 to Stephanie Sheridan.



1 MR. MILES: Tony, why don't you give the file 10:58:04  
2 to the witness and have him --  
3 THE REPORTER: I'm sorry -- I can't -- I'm  
4 sorry?  
5 MR. MILES: Why don't you hand the file, what 10:58:07  
6 was produced, to the witness and have him tell us 10:58:07  
7 whether it's complete or whether there are materials 10:58:11  
8 that are not contained in it; and if there are some 10:58:15  
9 materials not contained in it, what they are. 10:58:17  
10 MS. SHERIDAN: Actually, Chris, what I was 10:58:18  
11 just referring to is that top letter you're looking 10:58:20  
12 at. I think those are the numbers. 10:58:22  
13 MR. HULBURT: Yeah, there's a July -- there's 10:58:23  
14 a July 28th letter that itemized some documents that 10:58:23  
15 were produced. I think -- 10:58:25  
16 MS. SHERIDAN: I don't have that either. 10:58:31  
17 MR. HULBURT: I think that was in addition to 10:58:32  
18 documents that had already been produced. 10:58:39  
19 MR. MILES: Why don't we -- 10:58:39  
20 MS. SHERIDAN: Hold on, Don. What I had asked 10:58:39  
21 Karen to do, when she was getting ready to send the 10:58:39  
22 documents that Tony has, that has the July 27th date 10:58:44  
23 on it -- I told her I was going to be out of town, and 10:58:46  
24 I asked her to send those documents to Tony 10:58:49  
25 Richardson's attention. So are you telling me there 10:58:51  
26 is a second set of documents that were directed to me 10:58:54  
27 that were sent the next day? 10:58:56  
28 MR. HULBURT: I have a letter dated July 28th, 10:58:58  
50  
1 2000 by Federal Express to Stephanie Sheridan which 10:59:01  
2 itemizes 12 sets of documents, some of which Tony did 10:59:05  
3 just identify by Bates number. That was in addition 10:59:18  
4 to documents that had previously been produced to you. 10:59:22  
5 MS. SHERIDAN: There were never documents 10:59:28  
6 produced to me, because your office told us they would 10:59:30  
7 only send them to one lawyer. 10:59:32  
8 MR. HULBURT: There also is a letter dated 10:59:34  
9 July 31st, 2000 by Federal Express addressed to 10:59:37  
10 Stephanie Sheridan which produced additional documents 10:59:41  
11 from Bruce Silverman's file. 10:59:44  
12 MS. SHERIDAN: Can we get copies of those 10:59:47  
13 documents now? I would just like to say for the 10:59:48  
14 record, when I spoke to Karen last week, I indicated 10:59:50  
15 to her that I was going to be out of town from the 10:59:52  
16 next day forward because of our MKP deposition, which 10:59:54  
17 I've been in San Diego this entire week. I have not 10:59:58  
18 received any of those documents, nor has my office 11:00:00  
19 indicated to me that any of those documents have 11:00:02  
20 arrived. 11:00:04  
21 MR. HULBURT: Well, I don't know how they 11:00:05  
22 wouldn't have arrived. I mean, they were sent by 11:00:07  
23 Federal Express, and you got them the next day. 11:00:09  
24 MS. SHERIDAN: Well, I'm just telling you what 11:00:13  
25 I told your office, and asked that documents not be 11:00:15  
26 sent to my attention since I would not be available. 11:00:18  
27 I asked that any documents be sent to Mr. Richardson. 11:00:19  
28 And I have not been notified by my office that any 11:00:23  
51  
1 documents have arrived from your office. So I'm just 11:00:24  
2 asking, should we look at these documents now, or do 11:00:26  
3 you want to take a break later and do that? 11:00:29  
4 MR. MILES: Well, let -- let me recommend that 11:00:32  
5 -- that we go off the video record so we don't waste a 11:00:34

6 lot of tape. Okay. That we have the witness review 11:00:37  
7 -- with his counsel, review what has been produced. 11:00:40  
8 Okay. They can compare that with a letter that says 11:00:45  
9 what they're producing. Okay. And then we verify 11:00:47  
10 whether we have a complete file or not. If we don't 11:00:50  
11 have a complete file, then we can be told what it is 11:00:53  
12 we don't have, and we can get it while the deposition 11:00:55  
13 is here. But that would be my recommendation. Let's 11:00:58  
14 go off the video record so that we don't burn a lot of 11:01:01  
15 tape for no purpose. 11:01:04  
16 MR. RICHARDSON: I agree with that 11:01:07  
17 recommendation. 11:01:08  
18 MR. HULBURT: That's fine. 11:01:08  
19 THE VIDEOGRAPHER: So we'll go off the record 11:01:09  
20 then?  
21 MR. RICHARDSON: Yes, please.  
22 THE VIDEOGRAPHER: Off the record at 11:01  
23 a.m.  
24 MR. MILES: Let's stay. We'll keep the court 11:01:14  
25 reporter record in place so that if something happens 11:01:17  
26 we can have a record of that. But let me recommend, 11:01:22  
27 people intend to make some kind of a written record, 11:01:26  
28 they indicate that, and we'll go back on the video 11:01:30

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1 record first. Is that agreeable with everybody? 11:01:34  
2 MS. SHERIDAN: Yes. 11:01:39  
3 MR. MILES: Are we off the video record? 11:01:40  
4 THE VIDEOGRAPHER: Yes. The video is off, and 11:01:42  
5 the audio is off. 11:01:43  
6 MR. RICHARDSON: Chris, can I see -- all I 11:02:12  
7 have, for purposes of preparing for this deposition, 11:02:16  
8 are the documents that I meticulously read into the 11:02:19  
9 record, the July 27th cover letter and the documents 11:02:23  
10 that were appended to it. You referenced a July 28th 11:02:26  
11 and a July 31st letter -- letters, and I have not seen 11:02:29  
12 any of those materials. 11:02:32  
13 MR. HULBURT: So what do you want to do? 11:02:38  
14 MR. RICHARDSON: I'd like to take a look at 11:02:40  
15 the set that you have, assuming that there's no 11:02:40  
16 privileged -- no notations, if I may. 11:02:42  
17 MR. HULBURT: Well, then you're going to have 11:02:47  
18 to give me some time, because the documents that I 11:02:51  
19 have are probably not in order. Because I've gone 11:02:57  
20 through them, I've pulled stuff out, I've highlighted, 11:02:59  
21 I've made notes, you know, through the file. I've 11:03:03  
22 done my own work in the file, and I've created 11:03:05  
23 separate stacks of stuff -- 11:03:08  
24 MR. RICHARDSON: I see.  
25 MR. HULBURT: -- that was of interest to me. 11:03:09  
26 So I would have to reconstruct -- 11:03:11  
27 MR. RICHARDSON: Well --  
28 MR. HULBURT: -- whatever was produced with 11:03:14

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1 any given letter. I mean, that, you know -- so it's 11:03:16  
2 all been sent to you, and I guess it's in somebody's 11:03:20  
3 office waiting for somebody to look at it. 11:03:24  
4 MR. RICHARDSON: Well, I was in my office to 11:03:26  
5 the end of the day yesterday, and certainly, if it had 11:03:27  
6 been sent to me, whether by Fed Ex or some other 11:03:31  
7 expeditious means, I would have received it, and I 11:03:33  
8 haven't. So -- 11:03:37  
9 MR. HULBURT: Are you in the same office with 11:03:38  
10 Stephanie? 11:03:39

11 MR. RICHARDSON: No, I'm not. 11:03:40  
12 MS. SHERIDAN: That's why Karen was asked to 11:03:41  
13 send all the stuff to Tony, since I was going to be 11:03:44  
14 out of town. 11:03:46  
15 MR. MILES: Okay. And obviously she 11:03:48  
16 understood that, because she sent some of the stuff to 11:03:49  
17 him. 11:03:52  
18 MS. SHERIDAN: The first -- yeah, she 11:03:53  
19 specifically stopped the Fed Ex, the first set. And I 11:03:54  
20 told her that anything from Mr. Silverman's deposition 11:03:56  
21 should be directed to Tony Richardson, specifying that 11:03:59  
22 the reason for that was that I was going to be out of 11:04:00  
23 town because we've been here all week, and Tony didn't 11:04:03  
24 get here until last night. So we split things up to 11:04:05  
25 best be able to prepare for both defending and taking 11:04:08  
26 these depositions this week. 11:04:16  
27 MR. RICHARDSON: Yeah. And I assumed, and all 11:04:16  
28 my questions from the very outset were geared toward 11:04:16

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1 my understanding that the documents I -- I placed in 11:04:20  
2 the record were the complete set of documents, and 11:04:22  
3 obviously that's not the case. I might recommend 11:04:27  
4 that, because your office is local, and if we're going 11:04:30  
5 to try to get through this in any reasonable amount of 11:04:33  
6 time, that maybe a duplicate set of that be hand 11:04:36  
7 delivered to us. We can resume the deposition, 11:04:40  
8 understanding that that's going to come at some point, 11:04:43  
9 hopefully sooner as opposed to later, today. 11:04:46  
10 MR. MILES: Are you -- are you confident it's 11:04:48  
11 none of the materials that are here? 11:04:52  
12 MS. SHERIDAN: Unless they're a duplicate set. 11:04:53  
13 The stuff that Tony read before is the cover page from 11:04:55  
14 the first stuff that was sent to him. I don't know 11:04:58  
15 why there'd be duplicate materials. 11:05:01  
16 MR. MILES: Well, that's what I'm trying to 11:05:04  
17 find out, is whether it's not in the stack. I mean, 11:05:06  
18 you're --  
19 MS. SHERIDAN: You indicated earlier, Chris, 11:05:06  
20 that some of the Bates numbers he read were in the 11:05:07  
21 subsequent letters that -- that were sent. 11:05:09  
22 MR. HULBURT: I thought so. 11:05:11  
23 MS. SHERIDAN: That's why I was a little 11:05:13  
24 confused, because the letter that Tony was reading off 11:05:14  
25 of was Karen's transmittal letter of July 27th. 11:05:16  
26 MR. HULBURT: Right. Well, that's incomplete 11:05:20  
27 then. That -- there's more than that. 11:05:21  
28 MS. SHERIDAN: Okay. 11:05:22

55

1 MR. HULBURT: There is a July 28th letter, 11:05:23  
2 there is a July 31st letter, which lists other 11:05:25  
3 documents. 11:05:28  
4 MS. SHERIDAN: I would concur with Tony, then. 11:05:30  
5 It seems like maybe the most expeditious way to handle 11:05:32  
6 this would be to ask your office to make -- 11:05:33  
7 MR. HULBURT: Sure. 11:05:33  
8 MS. SHERIDAN: -- another set of both the July 11:05:36  
9 28th materials and the July 31st materials to have 11:05:37  
10 them sent to us. 11:05:40  
11 MR. HULBURT: Sure. 11:05:40  
12 MS. SHERIDAN: And we can just continue the 11:05:42  
13 deposition. 11:05:42  
14 MR. HULBURT: Sure, that's no problem. 11:05:43  
15 MR. MILES: I'm confused. Is there -- okay. 11:05:47

16 Is the stack of materials -- okay. Putting aside the 11:05:47  
17 description on the record, is the stack of materials 11:05:51  
18 complete or not? That's the critical first question 11:05:54  
19 to answer. If there are materials that are not in the 11:05:57  
20 stack, okay, then we need to get them; but if the 11:06:01  
21 stack is complete, then all we have to do is describe 11:06:04  
22 them.

23 MR. HULBURT: I don't know, Don, without 11:06:09  
24 looking at every page. My -- my -- my expectation is 11:06:10  
25 that it's not, because if these are all the documents 11:06:15  
26 that came with the July 27th cover letter, then 11:06:18  
27 they're only the July 27th documents. They're not the 11:06:20  
28 July 28th documents. They're not the July 31st 11:06:23

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1 documents. 11:06:26  
2 MR. MILES: Why don't you sample -- why don't 11:06:29  
3 you take the later letter, okay, that referenced the 11:06:30  
4 document and see whether that document is in the 11:06:32  
5 stack, and let's do a little sample. Okay. If it's 11:06:34  
6 in there, then that may give us some assurance we have 11:06:37  
7 everything. 11:06:41  
8 MR. HULBURT: Yeah. I don't think -- I don't 11:06:42  
9 think you have everything here. 11:08:02  
10 MR. MILES: Okay. Is there something that you 11:08:05  
11 can point to that you can say "yes," this is not in 11:08:06  
12 the stack? 11:08:08  
13 MR. HULBURT: Yeah. 11:08:10  
14 MR. MILES: Tell us -- tell us what it is. 11:08:12  
15 MR. HULBURT: Yeah, something from a -- the 11:08:12  
16 July 28th letter, which is a report from James Repace. 11:08:14  
17 MR. MILES: Okay. All right. Does the 11:08:23  
18 witness have his original file with him today that's 11:08:25  
19 required to be produced? 11:08:27  
20 MR. HULBURT: No. The file's been produced, 11:08:31  
21 and so I don't believe he brought it in, a -- a set 11:08:33  
22 like this. 11:08:38  
23 THE WITNESS: No, I didn't. 11:08:39  
24 MR. MILES: Okay. Can the witness -- is the 11:08:44  
25 original file here in San Diego, or is it in Los 11:08:46  
26 Angeles? 11:08:47  
27 MR. HULBURT: Well, I have his file in my 11:08:47  
28 office. 11:08:50

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1 MS. SHERIDAN: That's why we were saying we 11:08:50  
2 were going to get it copied. 11:08:52  
3 MR. MILES: You could -- you could bring the 11:08:53  
4 entire file back this afternoon? 11:08:54  
5 MR. HULBURT: That's where we started, yes.  
6 MS. SHERIDAN: That's what we were asking him 11:08:56  
7 to do, to have it copied now, the two sets that we 11:08:57  
8 don't have, while we're finishing what we are doing  
9 now so we don't waste time. 11:09:01  
10 MR. MILES: All right. Let's do that. 11:09:03  
11 MR. HULBURT: I'm in favor of that. 11:09:04  
12 MS. SHERIDAN: Okay. Could you make the call 11:09:05  
13 to your office now, and then we won't waste time. 11:09:07  
14 MR. HULBURT: I can. 11:09:09  
15 MR. RICHARDSON: Now I think this is an 11:09:12  
16 appropriate time to go off the record. 11:09:16  
17 (Discussion off the record.) 11:17:25  
18 THE VIDEOGRAPHER: Back on the record at 11:18 11:18:21  
19 a.m. 11:18:23  
20 (Exhibit 843 was marked for identification.) 11:18:27

21 BY MR. RICHARDSON: 11:18:27

22 Q. Mr. Silverman, I'm handing you what will be 11:18:32

23 marked as Exhibit 843. It's a July 25, 2000 letter 11:18:35

24 with enclosures from John McGuire of the Thorsnes, 11:18:45

25 Bartolotta & McGuire firm to Bruce Silverman. And if 11:18:52

26 you would review that and let me know when you're 11:18:55

27 done. 11:18:59

28 A. Okay. 11:19:33

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1 Q. In response to an earlier question about what 11:19:36

2 you've been retained to do in this case, Mr. 11:19:39

3 Silverman, you mentioned three areas: General 11:19:43

4 advertising expertise, tobacco use prevention and 11:19:45

5 preparation of a media plan. You mentioned those in 11:19:51

6 general terms, correct? 11:19:54

7 A. Yes. Yes. 11:19:55

8 Q. The first letter that you received with 11:20:04

9 respect to your retention as an expert in this case 11:20:10

10 was what is marked as Exhibit 840; is that correct? 11:20:14

11 It's dated June 16, 1999. 11:20:18

12 A. Yes, I believe it is. 11:20:20

13 Q. Okay. At some point did the scope of your 11:20:21

14 retention as an expert in this case change? 11:20:29

15 A. Not really, no. 11:20:32

16 Q. When you say "not really," what do you mean? 11:20:34

17 A. Not real -- not -- no. 11:20:36

18 Q. So, to your mind, the scope of your retention 11:20:39

19 in this case did not change? 11:20:41

20 A. No, it didn't. 11:20:43

21 Q. Directing your attention to Exhibit 843, and 11:20:50

22 what is -- and I should say, Exhibit 843 is Bates 11:20:52

23 stamped PX-BS-000635 through 000643. Again, directing 11:20:56

24 your attention to -- 11:21:06

25 MR. HULBURT: Mine starts with 636. 11:21:07

26 MR. RICHARDSON: Well, let's see. 11:21:14

27 MR. HULBURT: And the witness's -- the one 11:21:21

28 you've marked starts with 636. 11:21:22

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1 MR. RICHARDSON: Can I see. Okay, my -- my 11:21:25

2 mistake. 11:21:28

3 BY MR. RICHARDSON:

4 Q. Let me -- again, Exhibit 843, as marked, 11:21:29

5 starts with Bates Stamp Number PX-BS-000636 through 11:21:36

6 000643. I stand corrected. Directing your attention 11:21:43

7 to the first page of Exhibit 843 and the paragraph 11:21:51

8 starting "as you know" -- do you see that? 11:21:58

9 A. Yes. 11:22:02

10 Q. Okay. It reads, "As you know, the thrust of 11:22:03

11 the lawsuit has changed slightly since the 11:22:07

12 correspondence -- since that correspondence. This 11:22:09

13 will memorialize our previous discussions that the 11:22:12

14 media campaign has had an additional objective in not 11:22:15

15 only making people aware of the dangers of ETS, but 11:22:19

16 also to motivate those who smoke to do so outside the 11:22:23

17 home, and to motivate nonsmokers to request, or 11:22:26

18 demand, compliance with a smoke-free home policy." Is 11:22:29

19 that an accurate reading of the letter? 11:22:32

20 A. Yeah. I think you may have actually added a 11:22:36

21 word somewhere, but it wouldn't have changed the 11:22:38

22 meaning of it. 11:22:41

23 Q. Okay. Did this letter and the prior 11:22:41

24 discussions, or the previous discussions referenced in 11:22:48

25 it, change in any way the expert work you were doing 11:22:51

26 in this case? 11:22:53  
 27 A. No. 11:22:55  
 28 Q. From your retention in June 1999 you 11:22:58

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1 understood that part of your effort was to motivate 11:23:02  
 2 those who smoke to do so outside the home and to 11:23:05  
 3 motivate nonsmokers to request, or demand, compliance 11:23:09  
 4 with a smoke-free home policy? 11:23:13  
 5 A. Yes. Absolutely. 11:23:15  
 6 Q. Did you begin working on the objective as 11:23:23  
 7 stated in this July 25th, 2000 letter concerning 11:23:28  
 8 motivating smokers to smoke outside the home and to 11:23:33  
 9 motivate nonsmokers from the date of your retention in 11:23:37  
 10 June 1999? 11:23:40  
 11 A. Yes. 11:23:44  
 12 Q. Why don't you tell me the specific steps from 11:23:54  
 13 your date of initial retention in June 1999 that 11:23:57  
 14 you've taken to do the expert work in this case. 11:24:01  
 15 A. In the June and July period of 1999 my primary 11:24:12  
 16 role was to prepare the media plan as requested by 11:24:20  
 17 Preston Gates & Ellis, or to guide -- actually to 11:24:26  
 18 guide the preparation of the media plan, better said, 11:24:32  
 19 that was requested. There were -- as best I can 11:24:35  
 20 recall, there were certainly telephone meetings, 11:24:41  
 21 telephone conversations with Roger Carrick about the 11:24:46  
 22 nature of the assignment, what was trying to be 11:24:49  
 23 achieved. 11:24:54  
 24 In early July I went -- I initiated an 11:24:57  
 25 assignment with the planning department at Western 11:25:02  
 26 Initiative Media to develop the media plan itself. 11:25:09  
 27 That plan would have been initiated with the memo 11:25:13  
 28 which is attached to this. It's labeled 637. Janet 11:25:17

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1 Bescody was at that time the head of the planning 11:25:23  
 2 department. So this memo, which is a very brief memo, 11:25:27  
 3 was to describe what we were trying to achieve with 11:25:33  
 4 the -- with the campaign and to give some guidelines. 11:25:39  
 5 Part of it was for her to think about who might be the 11:25:43  
 6 appropriate people within her department to work on 11:25:46  
 7 this. Her department at that time had well over 100 11:25:48  
 8 people. 11:25:53  
 9 The next step in this would have been an 11:25:57  
 10 internal meeting with me and the team that was 11:26:02  
 11 assembled to work on this particular project, where -- 11:26:06  
 12 in which I would have told them, you know, my feelings 11:26:14  
 13 and thoughts based on the assignment, as I understood 11:26:16  
 14 it, and the material that had been provided to me at 11:26:20  
 15 that point. But as well as sharing with that team, as 11:26:24  
 16 much as I could, of what I knew and understood about 11:26:27  
 17 the subject based on prior experience. 11:26:31  
 18 The team went off then to develop the plan. 11:26:36  
 19 And to do that involves doing lots of research. The 11:26:39  
 20 digging out lots of research, both about the issue as 11:26:47  
 21 well as media research, very specifically media 11:26:52  
 22 research about the target audiences, how they use 11:26:56  
 23 media, what media they use. Digging out pricing 11:27:00  
 24 information, et cetera. Pretty standard stuff at that 11:27:03  
 25 point in developing a media plan. 11:27:06  
 26 A media plan would have been created, would 11:27:08  
 27 have been delivered down to Preston Gates. My 11:27:12  
 28 recollection is that there wasn't a formal 11:27:14

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1 presentation as we might do on a commercial account. 11:27:17

2 It was simply mailed down to them. My recollection is 11:27:19  
3 that there was a phone call or two from Preston Gates 11:27:24  
4 to us asking some questions about the plan. As you 11:27:28  
5 might expect, we use a lot of our jargon, and there 11:27:32  
6 are certain, you know, advertising terms and media 11:27:37  
7 terms that they were not familiar with, and they 11:27:40  
8 wanted explanations of. 11:27:42  
9 And, basically, that was it for a while. At 11:27:51  
10 least that's my recollection. We turned it in. And 11:27:57  
11 other than contacting them periodically to get paid, 11:28:00  
12 which you can see in the accompanying letters, paid 11:28:10  
13 for the media plan, there was really no substantive 11:28:12  
14 conversations that I recall for quite a long period of 11:28:16  
15 time. 11:28:18  
16 Then I was recontacted by Preston Gates & 11:28:20  
17 Ellis this year, a few months ago, to update me on the 11:28:26  
18 course of the action, and to start. And then we 11:28:39  
19 started having discussions about what, you know, what 11:28:45  
20 -- about, you know, what might be happening next in 11:28:55  
21 terms of that there would likely be depositions, that 11:28:58  
22 I'd be serving as an expert witness, that they would 11:29:01  
23 be providing me with, you know, certain documents that 11:29:04  
24 they want me to review, you know, about the state of 11:29:08  
25 the -- state of the issue of ETS, et cetera. And that 11:29:11  
26 they'd be periodically sending me material to look at 11:29:14  
27 in preparation for -- I guess for today. 11:29:18  
28 Q. Let me interrupt for a second. The 11:29:21

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1 conversations you're referring to are conversations 11:29:23  
2 you had a few months ago with the Preston Gates & 11:29:26  
3 Ellis firm? 11:29:30  
4 A. Initially, the conversation -- I was 11:29:31  
5 recontacted by Preston Gates & Ellis. It was 11:29:32  
6 explained to me at that point that Preston Gates & 11:29:38  
7 Ellis had a co-counsel on it, I think that's how it 11:29:42  
8 was explained to me, which was the Thorsnes firm. 11:29:46  
9 I attended a meeting at Preston Gates's 11:29:54  
10 offices in downtown Los Angeles, I don't remember the 11:30:00  
11 date, where there was a telephone conference. Brian 11:30:03  
12 Brookey was the attorney from Preston Gates who 11:30:10  
13 attended, and there were attorneys on the other side 11:30:13  
14 of -- on the other line from Thorsnes discussing my 11:30:15  
15 role as an expert. 11:30:24

16 Q. What was specifically discussed at the meeting 11:30:27  
17 in Los Angeles with the Preston Gates and the Thorsnes 11:30:30  
18 law firm? 11:30:34

19 A. More -- as I recall it, more than anything 11:30:38  
20 else, it was what, you know, I could or could not 11:30:41  
21 comfortably testify about. You know, what my -- you 11:30:45  
22 know, literally there were -- they were trying to 11:30:49  
23 distinguish between what an expert in advertising 11:30:52  
24 might testify to versus an advertise -- versus an 11:30:55  
25 expert in public relations, et cetera. 11:30:58

26 We discussed, in general, my views on the 11:31:04  
27 state of -- state of both awareness and motivation on 11:31:12  
28 the issue of secondhand smoke in California. What had 11:31:19

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1 -- what -- what the state program had been doing, what 11:31:24  
2 role, if any, the American Legacy Foundation campaign 11:31:27  
3 had had to that date. Other -- other tobacco use 11:31:30  
4 prevention campaigns. Pretty general discussion. 11:31:38

5 Q. Up until the time -- from the time you were 11:31:47  
6 retained, sometime after June 16, 1999, up until the 11:31:50

7 time of the meeting with the Thorsnes and Preston 11:31:54  
8 Gates firms, how much time had you personally invested 11:31:58  
9 in working as an expert on the case? 11:32:02  
10 A. I would have to estimate because I didn't bill 11:32:08  
11 for it. It was really during the preparation of the 11:32:11  
12 media plan. My -- and I can only guess. Is that an 11:32:15  
13 acceptable answer? 11:32:22  
14 Q. Well, as long as it's a reasonable estimate 11:32:22  
15 that you're making, that -- that would be fine. 11:32:24  
16 A. I would -- I would estimate that -- I would 11:32:27  
17 say it was somewhere between 30 and 60 hours was spent 11:32:36  
18 really during the period that we were putting the 11:32:42  
19 media plan together, and in conversations with the law 11:32:44  
20 firms, mostly in conversations with our staff in 11:32:49  
21 developing strategies and tactics that seemed viable 11:32:52  
22 for the media plan, reviewing the plan. 11:32:57  
23 Q. You mentioned that you hadn't billed for that 11:33:00  
24 time. Have you subsequently billed for it? 11:33:02  
25 A. No. 11:33:05  
26 MR. HULBURT: It's part of the \$10,000 11:33:07  
27 retainer for the plan itself. 11:33:10  
28 /// 11:33:11

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1 BY MR. RICHARDSON:  
2 Q. Is that accurate, Mr. Silverman? 11:33:12  
3 A. Yes, that's correct. 11:33:13  
4 Q. You'd mentioned earlier that you'd billed the 11:33:15  
5 Preston Gates firm -- I believe you said \$900? 11:33:19  
6 A. Yes. 11:33:23  
7 Q. What was the \$900 -- 11:33:23  
8 A. That was for the --  
9 Q. -- what constituted that? 11:33:26  
10 A. That was for the meeting that took place at 11:33:26  
11 their offices this spring -- 11:33:28  
12 Q. So --  
13 A. -- the telephone conference meeting. 11:33:31  
14 Q. Okay. So other than the \$900 you've billed 11:33:34  
15 for the telephone conference meeting and the unbilled 11:33:38  
16 time which is part of the \$10,000 retainer for the 11:33:41  
17 plan itself, are there any other bills or invoices to 11:33:45  
18 be submitted for your expert work in this case thus 11:33:49  
19 far? 11:33:51  
20 A. Yes, there will be, sure. 11:33:53  
21 Q. And what do you -- what do you anticipate 11:33:56  
22 those being? 11:33:58  
23 A. I anticipate billing for the time I've spent 11:33:59  
24 preparing -- very specifically preparing for this 11:34:03  
25 deposition, for the time in the deposition, for the 11:34:06  
26 time it took to get to the deposition, for the time it 11:34:11  
27 takes to get back from the deposition, meaning back to 11:34:14  
28 Los Angeles. 11:34:15

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1 Q. Let's go back to your discussion about the 11:34:17  
2 specific steps you've taken as an expert in this case. 11:34:20  
3 Have you reviewed ETS-related advertisements as a part 11:34:25  
4 of your expert work in this case? And, sir, when I 11:34:30  
5 say "ETS," do you understand that to mean 11:34:35  
6 environmental tobacco smoke? 11:34:36  
7 A. I do. 11:34:43  
8 Q. Okay. 11:34:43  
9 A. I can't say that I specifically reviewed ETS 11:34:46  
10 advertising in -- in preparation for this case. I was 11:34:50  
11 very familiar with existing ETS advertising that's 11:34:55



12 been prepared and run in the state of California. I 11:35:00  
13 was already knowledgeable about it. 11:35:04  
14 Q. How did you acquire such knowledge? 11:35:05  
15 A. I acquired that knowledge in my capacity -- 11:35:09  
16 former capacity as president of Asher Gould and in my 11:35:12  
17 current capacity at Initiative Media, and as a person 11:35:17  
18 who's interested in the subject matter. 11:35:20  
19 Q. Did you review, as a part of the steps you 11:35:25  
20 took to do the expert work in this case, any tobacco 11:35:29  
21 company documents? 11:35:32  
22 A. Yes. 11:35:34  
23 Q. What tobacco company documents did you review? 11:35:35  
24 A. I reviewed material that was provided me by 11:35:39  
25 the Thorsnes firm, copies of tobacco company 11:35:41  
26 advertisements for specific brands, printed copies of 11:35:49  
27 Website information that was published by the various 11:35:54  
28 tobacco companies, specifically Philip Morris's 11:35:59

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1 Website information, RJR's Website information. There 11:36:04  
2 may have been other documents. It's -- it would be in 11:36:16  
3 the material -- in the material that we've been 11:36:19  
4 discussing. 11:36:23  
5 Q. Were the tobacco company documents documents 11:36:25  
6 relating to ETS? 11:36:27  
7 A. Yes, ETS was specifically referenced. 11:36:30  
8 Q. As a part of your expert retention, expert 11:36:33  
9 work in this case, have you reviewed any public health 11:36:37  
10 documents regarding the health effects of ETS? 11:36:41  
11 A. Yes, I have. 11:36:45  
12 Q. What public health documents have you reviewed 11:36:45  
13 in that regard? 11:36:49  
14 A. There are documents included in -- in this 11:36:50  
15 pile of documents. Would you like me to go through it 11:36:54  
16 and pull out titles? 11:36:57  
17 Q. No. I just would like you to tell me 11:36:59  
18 generally -- 11:37:01  
19 A. Generally --  
20 Q. -- and we can talk about it more specific. 11:37:01  
21 A. -- various published -- various published 11:37:04  
22 information that I was either provided with or that I 11:37:05  
23 have read over the years, on this subject in 11:37:09  
24 preparation for creating advertising on the issue. 11:37:13  
25 Q. Did you review any documents concerning 11:37:17  
26 tobacco company statements regarding the health 11:37:18  
27 effects of ETS as a part of your expert work on this 11:37:22  
28 case? 11:37:25

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1 A. Yes, I have. 11:37:25  
2 Q. What such statements did you review? 11:37:26  
3 A. I reviewed various statements that are 11:37:29  
4 included in public documents, or documents that have 11:37:30  
5 been made public by the tobacco industry on their 11:37:35  
6 Website and in other publications, giving their points 11:37:38  
7 of view about the issue. 11:37:43  
8 Q. Did you review any tobacco company statements 11:37:44  
9 regarding the state of public awareness of the 11:37:48  
10 association between ETS and various diseases? 11:37:52  
11 A. I may have. 11:38:00  
12 Q. Do you have a specific recollection, as you 11:38:02  
13 sit here today, that you did or you didn't? 11:38:05  
14 A. I don't have a specific recollection, no, sir. 11:38:06  
15 Q. Let's go back to the meeting that you 11:38:11  
16 mentioned -- that you participated in in a short -- I 11:38:15

17 think you said a few months ago; is that correct? 11:38:19  
18 A. That's correct. 11:38:21  
19 Q. With the Thorsnes and the Preston Gates firms? 11:38:21  
20 A. Correct. 11:38:26  
21 Q. You said there was a discussion about what 11:38:27  
22 could be expected in terms of testimony, and the 11:38:29  
23 distinction was with respect to advertising as opposed 11:38:35  
24 to public relations; do you recall that? 11:38:37  
25 A. Yes. 11:38:39  
26 Q. Okay. What was discussed with respect to 11:38:40  
27 testimony that could be provided by an expert, with 11:38:43  
28 the distinction being between advertising and public 11:38:46

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1 relations? 11:38:49  
2 A. Well, in -- what was being discussed in that 11:38:52  
3 meeting was in some ways we were educating the 11:38:55  
4 attorneys on the distinctions between what an 11:38:59  
5 advertising person might know, or might have expertise 11:39:03  
6 in, versus what a public relations expert might have 11:39:08  
7 expertise in, or knowledge of, versus someone who does 11:39:11  
8 evaluations of communications programs. For example, 11:39:16  
9 I don't claim to be a public relations practitioner. 11:39:20  
10 I can comment on it as someone who has worked 11:39:27  
11 peripherally with public relations firms for more than 11:39:30  
12 30 years, but that's not my expertise. So there are 11:39:33  
13 distinctions on -- really I think what they were 11:39:38  
14 trying to decide is, among their expert witnesses, who 11:39:40  
15 would focus on what. 11:39:46  
16 THE VIDEOGRAPHER: We're going to conclude 11:39:51  
17 Tape 1. This is the conclusion of Tape 1 in the 11:39:52  
18 deposition of Bruce Silverman. Off the record at 11:39:55  
19 11:39 a.m. 11:39:59  
20 (Recess taken.) 11:43:32  
21 THE VIDEOGRAPHER: This begins Tape 2 in the 11:43:38  
22 deposition of Bruce Silverman. On the record at 11:43  
23 a.m. 11:43:45  
24 BY MR. RICHARDSON: 11:43:45  
25 Q. Mr. Silverman, when did the meeting with you 11:43:46  
26 and representatives with Thorsnes and Preston Gates 11:43:51  
27 firm take place? 11:43:54  
28 A. To the best of my recollection, it probably 11:43:57

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1 was in June of this year. 11:44:04  
2 Q. June of 2000? 11:44:07  
3 A. I believe so. 11:44:08  
4 Q. Who attended the meeting in person, and/or by 11:44:09  
5 telephone? 11:44:15  
6 A. In person, there was me, there was Lynn Doll, 11:44:16  
7 there was Professor Andrew -- Andy Johnson, Brian 11:44:21  
8 Brookey from Preston Gates. And I'm really -- I 11:44:28  
9 really don't recall who was on the line from Thorsnes. 11:44:40  
10 There was more than one -- as I recall, there was more 11:44:46  
11 than one voice coming out of the speaker phone. 11:44:50  
12 Q. You understood the voices to be attorneys from 11:44:52  
13 the Thorsnes firm? 11:45:01  
14 A. Yes. It was explained to me at that time. 11:45:01  
15 Q. Did you take any notes of what was discussed 11:45:01  
16 at the meeting? 11:45:05  
17 A. No. 11:45:05  
18 Q. Did you -- do you know if anyone else took any 11:45:06  
19 notes of what was being discussed at the meeting? 11:45:09  
20 A. I don't know. 11:45:11  
21 Q. How long did the meeting last? 11:45:14

22 A. Two or three hours. 11:45:20

23 Q. What was discussed with respect to the kind of 11:45:28

24 expert testimony that could be provided in this case 11:45:31

25 concerning advertising versus public relations? 11:45:35

26 A. Well, as I recall where it began, is in what 11:45:41

27 can you expect advertising to achieve, and we 11:45:49

28 discussed that. To that regard, and in this context, 11:45:55

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1 advertising does not exist merely to make people aware 11:46:00

2 of something. That's pretty useless. You have to 11:46:05

3 look for ways to get people to take action. If I'm 11:46:09

4 doing advertising for the Walt Disney company, for 11:46:13

5 example, my job is to get people's butts into theater 11:46:16

6 seats, or to walk through the gates at Disneyland, or 11:46:23

7 to, you know, buy a video movie. 11:46:26

8 In the case of environmental tobacco smoke, 11:46:28

9 the discussion really ranged around the relative 11:46:32

10 effectiveness of advertising campaigns to date, and 11:46:36

11 what we were talking about on a going forward basis of 11:46:39

12 actually getting people to take action, actions which 11:46:43

13 would make secondhand smoke a less dangerous -- less 11:46:47

14 dangerous problem. To that end, talking about 11:46:54

15 advertising that would encourage people to, you know, 11:46:57

16 take it outside, not smoke near others. Very, very 11:47:03

17 much not smoke near children. And how one might 11:47:06

18 achieve that via advertising. And, also, how you 11:47:10

19 would achieve it in the context of an overall 11:47:14

20 communications program, which does include community 11:47:20

21 action programs, other public relations efforts, et 11:47:23

22 cetera. 11:47:27

23 Q. What resulted from discussions concerning the 11:47:29

24 expert testimony in this case with respect to 11:47:35

25 advertising versus public relations? And I pose my 11:47:37

26 question that way because I believe that's how you had 11:47:42

27 presented discussion at the outset. Am I mistaken? 11:47:45

28 A. No, I don't think so. What we talked about 11:47:50

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1 was, as we would in any social marketing campaign, it 11:47:55

2 really is what are the roles and what are the 11:47:59

3 strategies. If your ultimate objective is to reduce 11:48:02

4 the incidence of -- to reduce the dangers to the 11:48:07

5 public of secondhand smoke, what are you trying to 11:48:14

6 achieve? What you're trying to do is to get people to 11:48:17

7 not smoke near other people. You know, I suppose you 11:48:20

8 could take it as far as trying to get people not to 11:48:23

9 smoke at all, but that's not really what this is 11:48:25

10 about, because that's a bigger problem. 11:48:28

11 There are certain efforts you go through that 11:48:32

12 advertising can achieve. There are certain efforts 11:48:36

13 that public relations might be able to achieve. And 11:48:39

14 it's important to understand the distinction and to 11:48:42

15 understand how they compliment each other, how the 11:48:45

16 programs compliment each other. 11:48:48

17 If we were setting out to do a campaign 11:48:50

18 tomorrow, it's very important that all of these 11:48:52

19 efforts are coordinated. Otherwise, you could just 11:48:55

20 end up, you know, doing a very good advertising 11:48:58

21 campaign that won't work because it's not getting in 11:49:01

22 the street support, and vice versa. 11:49:04

23 Q. Was a decision made at the June 2000 meeting 11:49:08

24 that you would be the expert who would opine and give 11:49:10

25 testimony about an -- an effective advertising 11:49:14

26 campaign with respect to the health effects of ETS? 11:49:19

27 A. Yes. 11:49:22  
28 Q. Was a decision made that Lynn Doll would be 11:49:23

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1 the expert who would be expected to opine and give 11:49:26  
2 testimony about the public relations effort that would 11:49:30  
3 be necessary for an effective ETS campaign? 11:49:33  
4 A. I believe that's true. 11:49:37  
5 Q. Okay. What decision was made with respect to 11:49:38  
6 the role Dr. Johnson would play as an expert in this 11:49:41  
7 case at the June 2000 meeting? 11:49:45  
8 A. My recollection is that Dr. Johnson's role 11:49:48  
9 would be to testify, or to be an expert on the -- on 11:49:51  
10 -- on what has been achieved with various programs in 11:50:01  
11 the State of California based on his knowledge as the 11:50:04  
12 evaluator of the Prop 99 campaigns. 11:50:06  
13 Q. With respect to your work as an expert, are 11:50:09  
14 you -- are you consulting regularly with Lynn Doll or 11:50:12  
15 Professor Johnson? 11:50:18  
16 A. No. 11:50:19  
17 Q. Since the meeting in -- well, prior to the 11:50:21  
18 meeting in June 2000, had you had any meetings or 11:50:24  
19 discussions with Lynn Doll with respect to your expert 11:50:26  
20 work in this case? 11:50:29  
21 A. I don't believe so. 11:50:35  
22 Q. Prior to the meeting in June 2000, had you had 11:50:37  
23 any discussions with Professor Johnson concerning your 11:50:39  
24 expert work in this case? 11:50:42  
25 A. No. 11:50:44  
26 Q. Since the meeting in June 2000, have you had 11:50:45  
27 any discussions with Lynn Doll about your, or her, 11:50:48  
28 expert work in this case? 11:50:52

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1 A. As I recall, there was one telephone 11:50:56  
2 conference, fairly brief telephone conference, that I 11:51:00  
3 participated in with Lynn Doll. Mickey McGuire was on 11:51:08  
4 the line. You may have been on the line. I don't 11:51:15  
5 remember who else was on the line. I don't believe 11:51:27  
6 Dr. Johnson was on the line. And most of that was, 11:51:28  
7 you know, scheduling, discussions about scheduling. 11:51:35  
8 Q. When was the second conference of which you -- 11:51:41  
9 which you mentioned, when did that take place? 11:51:43  
10 A. The telephone conference I just -- 11:51:46  
11 Q. Yes. 11:51:48  
12 A. I would guess that it was either late June, or 11:51:52  
13 early July, of this year. 11:51:54  
14 Q. To your mind, are you, Lynn Doll and Dr. -- 11:52:02  
15 Professor Johnson working as a team with respect to 11:52:06  
16 the media plan that's being suggested for California 11:52:09  
17 concerning the health effects of ETS? 11:52:16  
18 A. I wouldn't -- not necessarily, no, I wouldn't 11:52:19  
19 say that. 11:52:23  
20 Q. Is your work independent of the work that Lynn 11:52:25  
21 Doll is doing with respect to the media plan that's 11:52:28  
22 being suggested for California concerning the health 11:52:32  
23 effects of ETS? 11:52:37  
24 A. If there was -- if the -- if a program was to 11:52:42  
25 go forward, as an outcome of this case, and if I was 11:52:47  
26 involved and if Lynn Doll was involved, if our 11:52:55  
27 respective firms were involved, we would work very 11:52:58  
28 closely together. In terms of preparing for this 11:53:01

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1 particular -- very specifically this deposition, other 11:53:08  
2 than, you know, recognizing that advertising and 11:53:14

3 public relations efforts for a campaign like this, it 11:53:18  
4 must be one campaign. You know, we've discussed that, 11:53:21  
5 but that's about it. Dr. Johnson's role, or Professor 11:53:27  
6 Johnson -- I'm not sure. Is he a doctor? I don't 11:53:32  
7 know. 11:53:34  
8 Q. I don't know either. 11:53:34  
9 A. But his role would be really -- he would be 11:53:36  
10 issuing the report card. So he wouldn't necessarily 11:53:38  
11 be involved with us, meaning with the 11:53:43  
12 advertising/public relations practitioners, on an 11:53:47  
13 upfront basis. His job was possibly to set 11:53:50  
14 milestones, which I suppose we would -- it would be 11:53:53  
15 smart for us to know what we were supposed to go and 11:53:57  
16 get. 11:54:01  
17 Q. As part of your response you mentioned 11:54:01  
18 preparing for this -- this deposition. I just want to 11:54:04  
19 be clear with my question. It wasn't whether you're 11:54:07  
20 working with Lynn Doll for purposes of preparing to 11:54:09  
21 give testimony as an expert. My question is more with 11:54:13  
22 respect to the expert work you're doing in developing 11:54:17  
23 and creating a 12-month media plan. Are you working 11:54:20  
24 with Lynn Doll in putting that plan together? 11:54:24  
25 A. We would. The answer would be, at such time 11:54:33  
26 that it was appropriate, we would work together. We 11:54:37  
27 have not been working together recently on that, 11:54:40  
28 because we haven't done further work on the media plan 11:54:44  
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1 since the plan was created more than a year ago. You 11:54:48  
2 know, at that time we haven't -- we haven't changed 11:54:55  
3 the plan. We haven't added to the plan. We haven't 11:55:00  
4 subtracted from the plan. We just haven't been in 11:55:02  
5 that -- haven't been doing that. 11:55:07  
6 Q. I do want to talk specifically about what went 11:55:07  
7 into creating the plan, but let me pose a general 11:55:09  
8 question now, and that is, have you worked -- did you 11:55:12  
9 work with Lynn Doll in terms of putting out the -- the 11:55:15  
10 plan as it's presently constituted? 11:55:17  
11 A. Lynn Doll and I have worked together for many 11:55:22  
12 years. Lynn Doll and our firm and I have worked 11:55:24  
13 together with many years. Her firm, Rogers & 11:55:31  
14 Associates, was a subcontractor to Asher Gould on the 11:55:34  
15 California Department of Health Services campaign. 11:55:38  
16 Lynn and I worked very, very closely together on those 11:55:43  
17 programs. 11:55:47  
18 At the time that the media plan was created 11:55:48  
19 for Preston Gates & Ellis, I had conversations with 11:55:55  
20 Lynn Doll, informal conversations with Lynn Doll, 11:56:00  
21 about the assignment. Not knowing that she was 11:56:03  
22 involved -- I'm not sure she was involved at that 11:56:06  
23 time. I just consulted with her as a friend and 11:56:10  
24 colleague, who -- whose opinions I respect. 11:56:13  
25 Q. Okay. Going back to the meeting in June 2000, 11:56:21  
26 the initial one we were discussing, you mentioned that 11:56:24  
27 you were also -- at that time you also discussed the 11:56:27  
28 state of awareness and motivation on the issue of ETS; 11:56:30  
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1 is that a correct summarization? 11:56:34  
2 A. That was a -- that was a topic that we 11:56:37  
3 discussed. 11:56:40  
4 Q. What was discussed along those lines? 11:56:40  
5 A. My recollection is that we -- we would -- we 11:56:43  
6 were explaining to the attorneys the distinction from 11:56:51  
7 a -- from a social marketing standpoint between 11:56:56

8 awareness and motivation. As is the case in any 11:56:58  
9 marketing category, people can be aware of a product 11:57:05  
10 or aware of a service, but that doesn't necessarily 11:57:11  
11 mean that they're going to take action on that 11:57:13  
12 awareness. And it's insufficient from a professional 11:57:16  
13 standpoint, from a marketing standpoint, to simply 11:57:22  
14 look at awareness as an objective. You're always 11:57:26  
15 trying to achieve motivation. You're always trying to 11:57:31  
16 get people to take specific action or not take an 11:57:34  
17 action, as the case may be. 11:57:37

18 Ironically, in social marketing, more often 11:57:38  
19 than not, it's not do something as opposed to do 11:57:42  
20 something. You know, if I'm selling soap, I want them 11:57:45  
21 to go to the store and buy soap. If I'm doing tobacco 11:57:49  
22 use prevention, I'm trying to not get them to go to 11:57:52  
23 the store, or I'm trying to -- trying to get people to 11:57:55  
24 stop, or I'm trying to get people to be more 11:58:04  
25 respectful of the rights and needs and health concerns 11:58:04  
26 of others, et cetera. 11:58:07

27 One of the points of that discussion was that 11:58:09  
28 most communications about secondhand smoke that I'm 11:58:15

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1 aware of in the State of California dealt with the 11:58:21  
2 issue of awareness, that it was more than trying to 11:58:25  
3 communicate that secondhand smoke was more than a 11:58:29  
4 nuisance. It was more an obnoxious substance, but 11:58:33  
5 that there were health concerns related to it. You 11:58:39  
6 have to walk before you run. You have to take one 11:58:44  
7 step forward at a time. And creating awareness of an 11:58:46  
8 issue is the first step. It was very clear to me, and 11:58:51  
9 to my colleagues, that there's never been sufficient 11:58:54  
10 efforts made to really get people from an advertising 11:59:02  
11 standpoint to -- you know, what do you want them to do 11:59:05  
12 about this problem, short of not smoking altogether? 11:59:09  
13 Just in going where with that. And there's no real 11:59:17  
14 evidence that I could see that -- that advertising had 11:59:21  
15 achieved much in that regard of getting people -- 11:59:26  
16 motivating people to change their behavioral pattern 11:59:33  
17 regarding secondhand smoke specifically. 11:59:37

18 The -- the -- I think it's important to 11:59:42  
19 recognize that secondhand smoke was never really a 11:59:45  
20 discreet objective in the California tobacco use 11:59:55  
21 prevention campaign. They -- they -- secondhand smoke 12:00:01  
22 was one of the reasons given, in essence, for people 12:00:07  
23 to consider changing their -- whether they should 12:00:11  
24 smoke, or not smoke. But as a percentage of the 12:00:14  
25 various efforts that had been made, it was very, very 12:00:20  
26 small, and it wasn't looked upon as, "Well, here's 12:00:23  
27 secondhand smoke, and here's what we need to do about 12:00:26  
28 that." Just didn't happen. 12:00:29

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1 Q. Are you suggesting that secondhand smoke was 12:00:30  
2 not focused on, but general smoking was, with respect 12:00:32  
3 to the earlier tobacco use prevention program? 12:00:37

4 A. I think if you look back at ten years of 12:00:40  
5 tobacco use prevention advertising in this day, that 12:00:42  
6 although there was secondhand smoke messaging, it 12:00:47  
7 wasn't designed to stand on its own. It wasn't 12:00:51  
8 designed to get the public to really take any action, 12:00:55  
9 other than -- than consider secondhand smoke as yet 12:01:01  
10 another reason to not take up smoking, or possibly to 12:01:04  
11 quit smoking. 12:01:07

12 Q. You said one of the things that was discussed 12:01:09

13 was -- at the June 2000 meeting was getting people -- 12:01:10  
14 motivating people to change their behavioral pattern 12:01:14  
15 regarding secondhand smoke specifically, correct? 12:01:17  
16 A. That's correct. 12:01:20  
17 Q. Was there anyone who had -- who expressed a 12:01:22  
18 difference of opinion with you on -- on that matter? 12:01:26  
19 A. I don't believe so. 12:01:32  
20 Q. Was there any disagreement with respect to the 12:01:33  
21 effectiveness of media campaigns changing people's 12:01:36  
22 behavior with respect to smoke at all? Was there any 12:01:42  
23 disagreement among the group in June 2000, at the June 12:01:47  
24 2000 meeting with respect to that? 12:01:50  
25 MR. HULBURT: You're talking about 12:01:53  
26 effectiveness of campaigns that have already been in 12:01:54  
27 place, or, in the abstract, the effectiveness of a 12:01:56  
28 campaign in general? 12:01:59

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1 MR. RICHARDSON: No. 12:02:00  
2 BY MR. RICHARDSON:  
3 Q. Let me rephrase the question. Was there any 12:02:01  
4 discussion at the June 2000 meeting -- during the 12:02:04  
5 discussion at the June 2000 meeting concerning the 12:02:06  
6 effectiveness of existing or past campaigns, tobacco 12:02:10  
7 use prevention campaigns, was there any disagreement 12:02:14  
8 about the effectiveness of those campaigns in terms of 12:02:18  
9 changing people's behavior? 12:02:21  
10 A. I don't believe so. 12:02:24  
11 Q. Okay. So you, Lynn Doll, and Professor 12:02:25  
12 Johnson, for example, agreed that past, perhaps 12:02:32  
13 current, tobacco use prevention campaigns had not 12:02:36  
14 effectively changed people's behavior with respect to 12:02:39  
15 the -- with respect to smoking or not smoking? 12:02:44  
16 A. You know, you just changed the question 12:02:49  
17 midstream. We certainly believe that in this state 12:02:51  
18 the -- there is clear evidence that tobacco use has 12:02:56  
19 been reduced in the past decade. Prevalence of 12:03:02  
20 smoking is lower now than it was in 1990, 12:03:08  
21 significantly lower. Attitudes towards tobacco use 12:03:13  
22 have changed significantly. Knowledge of the dangers 12:03:19  
23 of tobacco use have changed. Knowledge of the not 12:03:23  
24 very admirable marketing practices of the tobacco 12:03:30  
25 industry, that information has been conveyed to -- to 12:03:34  
26 goodly portions of the population. 12:03:40  
27 The question that we chatted about, that we 12:03:43  
28 discussed, really had to do with the issue of 12:03:47

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1 secondhand smoke. Do the people of this state -- have 12:03:53  
2 the people of this state been sufficiently motivated 12:03:58  
3 to change their behavior -- their behavior regarding 12:04:02  
4 smoking around other people. 12:04:07  
5 Q. Uh-huh.  
6 A. The answer is semi yes. Some people have 12:04:12  
7 changed their behavior. There is -- there is 12:04:15  
8 certainly evidence of that. But what's interesting to 12:04:17  
9 us is that there are a lot of people who will say -- 12:04:21  
10 in answer to the question "Is secondhand smoke 12:04:27  
11 dangerous?" they will say "Yes." If you ask them why, 12:04:29  
12 they may even play back one of the lines that appeared 12:04:35  
13 in a lot of that advertising. And that is that 12:04:39  
14 secondhand smoke can kill you. Then you ask them, "Do 12:04:42  
15 you still smoke in your household?" "Yes." "Do you 12:04:45  
16 smoke in front of your family?" "Yes." 12:04:55  
17 If they worked at a small business where 12:04:55

18 smoking is still permitted and they smoke. "Yes." 12:04:55  
19 "Do you smoke in a room with other people?" "Yes." 12:04:58  
20 So there's a disconnect. There's a disconnect. This 12:05:01  
21 -- the various programs have not, obviously, clearly, 12:05:06  
22 in my view -- have not yet successfully gotten the 12:05:10  
23 population of this state, particularly smokers, 12:05:16  
24 particularly smokers from certain populations, to 12:05:21  
25 change their behavioral pattern enough. Enough. And 12:05:25  
26 that's what we talked about. 12:05:31  
27 And, actually, that was really a restatement 12:05:32  
28 of what we talked about a year prior. If you were to 12:05:35  
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1 go into the media plan that was delivered to Preston 12:05:40  
2 Gates & Ellis, it very specifically talks about the 12:05:45  
3 need to motivate behavioral change at that time, and 12:05:48  
4 there were all sorts of references to that disconnect 12:05:52  
5 throughout that plan. 12:05:56  
6 Q. So if I could summarize, what you're saying is 12:05:58  
7 that there is a state of awareness of the health 12:06:01  
8 effects of secondhand smoke, but the conduct hasn't 12:06:04  
9 followed that awareness as yet? 12:06:09  
10 A. I think that's fair. And that's also sort of 12:06:14  
11 damning about the advertising campaigns and public 12:06:17  
12 relations campaigns in general, because there's no 12:06:21  
13 point to these campaigns if they don't motivate 12:06:27  
14 change. Any more than it makes sense for my -- my 12:06:31  
15 client that calls Junior to make people aware that 12:06:41  
16 they have good hamburgers. If they don't go to the 12:06:44  
17 store, the advertising is worthless. 12:06:49  
18 Q. You mentioned two broad subject matters that 12:06:52  
19 were discussed at the June 2000 meeting that you 12:06:55  
20 attended with Lynn Doll, Professor Johnson, 12:06:59  
21 representatives of the Preston and Gates and Thorsnes 12:07:02  
22 firm. Those were, as I understand them, the 12:07:05  
23 distinction between what could be expected as far as 12:07:08  
24 expert testimony concerning advertising as opposed to 12:07:11  
25 public relations for tobacco use prevention campaign 12:07:15  
26 and the state of awareness and the motivation to 12:07:19  
27 change behavior with respect to the issue of exposure 12:07:24  
28 to secondhand smoke. Were there any other issues that 12:07:27  
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1 were discussed at the June 2000 meeting, other than 12:07:32  
2 those two? 12:07:36  
3 A. I think that -- I think they explained to us 12:07:43  
4 how they wanted us to bill. That may have been the 12:07:48  
5 first time that I fully understood the role of 12:07:51  
6 Thorsnes versus Preston Gates, that Preston Gates was 12:07:56  
7 sort of phasing away and Thorsnes was coming in. I 12:08:01  
8 believe at that meeting there may have been some -- an 12:08:08  
9 update on, you know -- on the original case, which, as 12:08:13  
10 I understood, it was related to Prop 65. 12:08:18  
11 Q. Are you still sending invoices and bills to 12:08:27  
12 the Preston Gates firm for your expert work in this 12:08:30  
13 case? 12:08:33  
14 A. No. I sent them one bill, which they paid, 12:08:33  
15 and I've been instructed to send all future billing to 12:08:37  
16 Thorsnes. 12:08:40  
17 Q. Okay. You mentioned a second conference that 12:08:40  
18 took place -- I believe you said it was over the 12:08:43  
19 telephone in late June/early July 2000. Do you recall 12:08:45  
20 that? 12:08:50  
21 A. Yes. 12:08:50  
22 Q. What was discussed at that second conference 12:08:50



23 with respect to your expert work in this case? 12:08:54  
24 A. As I think I said earlier, it seemed -- as I 12:09:00  
25 recall, it was mostly, you know, about scheduling, and 12:09:02  
26 when depositions might be and when I might be 12:09:06  
27 available, things like that. I don't remember it as 12:09:08  
28 being tremendously substantive. 12:09:15

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1 Q. Was this by telephone? 12:09:18  
2 A. Yes, from, you know, various people's offices. 12:09:19  
3 Q. Who were the other individuals who 12:09:22  
4 participated in the telephone conference call? 12:09:25  
5 A. Lynn Doll was on the line. I was on the line. 12:09:28  
6 I think I answered this question already. I know 12:09:32  
7 Mickey McGuire was on the line. Brian may have been 12:09:35  
8 on the line. I don't remember who else from Thorsnes. 12:09:39  
9 I think that may have been the first time I was really 12:09:53  
10 aware that -- what date the deposition would be and 12:09:55  
11 that it would be down here and that I'd have to come 12:09:57  
12 in the night before, and -- you know, unless I wanted 12:10:01  
13 to fly very early in the morning, that kind of thing. 12:10:04  
14 Q. You said Brian may have been on the line. Are 12:10:07  
15 you referring to Brian Brookey? 12:10:09  
16 A. You know -- Brian Brookey. I don't remember. 12:10:12  
17 I don't -- I don't think so. He might have been. I 12:10:16  
18 don't remember. 12:10:20  
19 Q. Who at the Initiative Media has assisted you 12:10:28  
20 with your expert work in this case? 12:10:32  
21 A. From a clerical standpoint, my assistant. Her 12:10:37  
22 name is Tiffany Moon, which is spelled like the store 12:10:40  
23 and the satellite. The media plan, the lead planner 12:10:47  
24 on it was a gentleman named Robert Holtkamp, 12:10:58  
25 H-o-l-t-k-a-m-p; one of his associates, whose name is 12:11:05  
26 Cole, C-o-l-e, Hartman, H-a-r-t-m-a-n. They -- they 12:11:20  
27 would have worked with people from our research 12:11:32  
28 department. 12:11:42

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1 THE REPORTER: I'm sorry? They would have  
2 worked?  
3 THE WITNESS: They would have worked with 12:11:32  
4 people from our research department, though I don't 12:11:41  
5 know who in research was literally working on it. And 12:11:44  
6 there were other people on that planning team. I just 12:11:52  
7 don't know who they were. I don't recall who they 12:11:55  
8 were. 12:11:56  
9 BY MR. RICHARDSON:  
10 Q. So the primary people that you can recall are 12:11:59  
11 Tiffany Moon, Robert Holtkamp, Cole Hartman, and some 12:12:01  
12 individuals from the research department? 12:12:07  
13 A. Yeah. Yeah. 12:12:10  
14 Q. You mentioned Robert Holtkamp in the past 12:12:12  
15 tense. Is he no longer working with you with respect 12:12:15  
16 to the 12-month media plan you've developed? 12:12:18  
17 A. He isn't. Right -- he is still with 12:12:23  
18 Initiative Media. But he is not working on this at 12:12:25  
19 this point, no. The Initiative Media planning team 12:12:30  
20 has not done any further work on the plan since it was 12:12:34  
21 submitted last year. 12:12:39  
22 Q. Once further work is to be done with respect 12:12:41  
23 to the plan, is a team going to be comprised of the 12:12:47  
24 individuals you've mentioned, Tiffany Moon, Robert 12:12:50  
25 Holtkamp, Cole Hartman, individuals from the research 12:12:53  
26 department and yourself? 12:12:57  
27 A. I don't know. I don't know who I would put on 12:12:58

28 it. If Robert Holtkamp is available at such future 12:13:02  
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1 date, I would like him to be involved. But he is -- 12:13:07  
2 he's not working in the same group he worked in a year 12:13:14  
3 ago. A year ago he and Cole Hartman worked on the 12:13:17  
4 same team. They're no longer on the same team. It's 12:13:22  
5 hard to have people from different teams work together 12:13:24  
6 as a practical matter. And Holtkamp has been offered 12:13:26  
7 a transfer to our Atlanta office to head the planning 12:13:30  
8 team on Bell South. And so, if he's in Atlanta, then 12:13:33  
9 I won't be able to use him. 12:13:37

10 Q. Other than being available for the deposition, 12:13:39  
11 for example, and perhaps as a witness at trial -- at 12:13:42  
12 the trial, have you completed your expert work in this 12:13:45  
13 case? 12:13:48

14 A. As far as I know, yes. 12:13:55

15 Q. Do you anticipate doing any additional work 12:13:56  
16 with respect to the 12-month media plan, for example, 12:13:59  
17 tweaking it in some ways? 12:14:04

18 A. If -- yes, we've discussed that. And if asked 12:14:05  
19 to do so, I would do so. I'm not exactly sure what 12:14:08  
20 "tweaking" means in your definition. 12:14:13

21 Q. What does "tweaking" mean in your definition? 12:14:16

22 A. The media plan was created in early July of 12:14:20  
23 1999. The media world is incredibly dynamic. 12:14:25  
24 Everything changes. Audiences watch different 12:14:34  
25 programs. Audiences are watching different programs, 12:14:39  
26 listening to different radio stations, reading 12:14:42  
27 different magazines, even looking at different 12:14:44  
28 billboards today than they looked at a year ago. And 12:14:47  
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1 a year from now, that would change again. It's just 12:14:51  
2 -- just inevitable. 12:14:56

3 Media is all subject to supply-and-demand 12:14:58  
4 economics. So the pricing that's outlined in that 12:15:04  
5 plan would, by necessity, have to be revisited and 12:15:05  
6 reevaluated. Literally, radio stations change 12:15:10  
7 formats. Television programs go off the air. All of 12:15:15  
8 those kind of issues affect that. So given that that 12:15:18  
9 plan was created on a semi-hypothetical basis, because 12:15:22  
10 we didn't know what a real start date would be -- you 12:15:25  
11 know, we used January 1, 2000 as an arbitrary point. 12:15:27  
12 On a going forward basis we would have to go back. 12:15:35  
13 And I think the fundamental strategies would hold, 12:15:37  
14 because they're very sound and they're soundly 12:15:41  
15 researched. But I think tactically we'd have to go 12:15:43  
16 back and revisit the tactics and reprice it, 12:15:47  
17 reschedule it, based on whenever anybody's set to 12:15:49  
18 really go do it. 12:15:54

19 Q. Between now and the time of trial, if trial 12:15:57  
20 were to commence at the end of September, what 12:15:59  
21 specific work do you anticipate doing as an expert in 12:16:03  
22 this case? 12:16:06

23 A. If -- if I was told that I was going to be 12:16:10  
24 called as a witness, I would -- I would study that 12:16:12  
25 much harder, the materials that have already been made 12:16:15  
26 available. Try to prepare a little bit more 12:16:19  
27 carefully. I would update -- and I would certainly go 12:16:24  
28 back in at the media plan, and, if nothing else, I 12:16:30  
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1 would attempt to determine present value on the 12:16:34  
2 numbers. 12:16:39  
3 Generally speaking, advertising campaigns take 12:16:43

4 a minimum of three months of lead time to get started, 12:16:45  
5 because there's time needed to create advertising and 12:16:51  
6 to negotiate placement and to produce work and to get 12:16:55  
7 it in. So, you know, literally if there was a trial 12:17:01  
8 in September, and let's suppose that a judgment came 12:17:07  
9 down, or a settlement came down, in which somebody 12:17:13  
10 said, "Go do that media plan." And a date became 12:17:16  
11 January of 2001. My guess would be, right now, that 12:17:22  
12 that same media plan might cost 20 to 25 percent more 12:17:27  
13 to implement. And that's just a guess. And what we 12:17:32  
14 would have to do, so it isn't a guess, is to go back 12:17:39  
15 in and reprice every single element and adjust -- 12:17:41  
16 adjust the various tactics that may have become either 12:17:45  
17 obsolete, or other opportunities may be preferable. 12:17:48  
18 Q. You mentioned that one thing that you may need 12:17:57  
19 to do is revisit the tactics. What did you mean by 12:18:07  
20 that? 12:18:07  
21 A. Tactics are the specific -- the specific media 12:18:07  
22 forms or media opportunities that you're going to 12:18:11  
23 avail yourself of. A media strategy is use 12:18:13  
24 television. A media tactic is be on "E.R." 12:18:20  
25 THE REPORTER: Be on? 12:18:20  
26 THE WITNESS: Be on "E.R." I, of course, 12:18:26  
27 picked a program that doesn't play well for a 12:18:27  
28 stenographer. Be on "Seinfeld." So, you know, 12:18:29

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1 looking at those tactics. For example, when we did 12:18:37  
2 this plan, programs like "Big Brother" didn't exist. 12:18:40  
3 Programs like "Survivor" didn't exist. Programs like 12:18:45  
4 "Millionaire" didn't exist. These programs today are 12:18:49  
5 capturing very large audiences. We might want to 12:18:53  
6 consider them. In considering them, we would -- might 12:18:57  
7 also no longer want to consider certain programs that 12:18:59  
8 were delineated in the plan. Same applies to 12:19:03  
9 magazines. Again, the media world's a very dynamic 12:19:05  
10 one. 12:19:10  
11 BY MR. RICHARDSON:  
12 Q. Well, then, is it safe to say that the 12:19:10  
13 12-month media plan as is presently constituted, 12:19:13  
14 which, as you stated, you provided in June -- I'm 12:19:17  
15 sorry -- July of last year, that you will be doing 12:19:20  
16 additional work with respect to that plan? 12:19:26  
17 A. Yeah, I'll be tweaking it. We know that 12:19:31  
18 strategically it's a very, very sound plan. It's a 12:19:41  
19 well-conceived plan. It's a well-conceived and 12:19:44  
20 well-researched plan. But if somebody was to ask me 12:19:48  
21 how much will this -- how much will this plan cost in 12:19:57  
22 the year 2001, I have to go back and research that. 12:20:01  
23 That takes time and money to do. So I haven't been 12:20:04  
24 asked to do that as yet. 12:20:07  
25 Q. How much time and money would it take? 12:20:08  
26 A. It would take a minimum of two weeks. It 12:20:11  
27 would probably require 5- or \$6,000, maybe more, in 12:20:13  
28 fees to be paid. 12:20:17

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1 Q. Did you create any drafts of the 12-month fund 12:20:21  
2 media plan prior to submitting it in July 1999? 12:20:27  
3 A. Various drafts during the course of progress 12:20:35  
4 and creating the work, sure. I'm sure that various 12:20:40  
5 drafts were created, that bits and pieces of it were 12:20:41  
6 reviewed and finally put together. There wasn't a 12:20:44  
7 draft plan submitted to the client. The client 12:20:46  
8 received no plan. 12:20:51

9 Q. Did you retain any copies of the various 12:20:52  
10 iterations of the plan before the plan was submitted 12:20:55  
11 to the client in July of 1999? 12:21:01  
12 A. I don't believe so. We typically -- we 12:21:04  
13 typically don't do that. 12:21:09  
14 Q. As -- as we sit here today, do you have any 12:21:12  
15 hard copy or electronic versions of drafts of the 12:21:14  
16 media plan before it was submitted to the client in 12:21:18  
17 July of 1999? 12:21:22  
18 A. I don't believe I do. I don't believe that 12:21:24  
19 those exist. 12:21:25  
20 Q. You know I used the term you used, "the 12:21:27  
21 client." Who is the client that you're referring to? 12:21:28  
22 A. Well, at that point the client was Preston 12:21:31  
23 Gates & Ellis. I use that loosely. We were at that 12:21:36  
24 time -- you know, it was explained to us that Preston 12:21:38  
25 Gates & Ellis was representing an entity, or entities, 12:21:43  
26 that were planning this lawsuit. But from our 12:21:48  
27 standpoint, we were working for Preston Gates & Ellis. 12:21:51  
28 That's who -- my client is whoever I send the bill to. 12:21:55  
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1 Q. Other than the actual 12-month fund media plan 12:21:59  
2 itself, have you generated any other documents, for 12:22:02  
3 example, reports, with respect to your expert work in 12:22:06  
4 this case? 12:22:10  
5 A. No. 12:22:11  
6 MR. RICHARDSON: It's close to 12:30. I would 12:22:11  
7 suggest that we break for lunch at this point before I 12:22:16  
8 move into a new area. Can we go off the record. 12:22:20  
9 THE VIDEOGRAPHER: Off the record at 12:22 12:22:25  
10 p.m.  
11 (Whereupon, the lunch recess was taken at  
12 12:22 p.m.)  
13  
14 \* \* \* \*  
15  
16  
17  
18  
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28

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1 SAN DIEGO, CALIFORNIA; THURSDAY, AUGUST 3, 2000  
2 1:35 P.M.  
3  
4 THE VIDEOGRAPHER: We're back on the record at 13:36:28  
5 1:36 p.m. 13:36:40  
6 (Exhibit 844 was marked for identification.)  
7  
8 FURTHER EXAMINATION BY MR. RICHARDSON:  
9 Q. Mr. Silverman, I have had marked as Exhibit 13:36:43  
10 844 three sets of documents, which I understand to be 13:36:48  
11 the balance of the documents that have been produced 13:36:54  
12 to us as being your expert work file. There's a cover 13:37:00  
13 letter dated July 28, 2000 from John McGuire to 13:37:05

14 Stephanie Sheridan, and it enclosed additional 13:37:15  
15 documents from Bruce G. Silverman's expert file which 13:37:18  
16 may be relied upon, including -- it includes 12 items 13:37:24  
17 that are listed. And I'm not going to burden the 13:37:30  
18 record by repeating them. 13:37:32  
19 I would ask you to review those and confirm 13:37:35  
20 that those are documents that comprise your expert 13:37:37  
21 work file. There's a second set of papers with a 13:37:43  
22 cover letter dated July 31st, 2000 from Karen Frostrom 13:37:50  
23 to Stephanie Sheridan. And it's enclosing additional 13:37:55  
24 information from Bruce G. Silverman's expert file, 13:37:59  
25 which is Bates stamped PX-BS-000695 to 000714. 13:38:03  
26 MS. SHERIDAN: And just -- I'd just like to 13:38:36  
27 say, for the record, the documents that the witness is 13:38:37  
28 looking at now that have the cover letter of July 28. 13:38:40

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1 Karen Frostrom, when she brought the documents in at a 13:38:43  
2 lunch break, indicated that everything is in that set 13:38:46  
3 except for Item Number 11, which I believe is 13:38:56  
4 indicated to be the SCOTH report. And we were told 13:38:56  
5 that that has not yet been provided to the witness and 13:38:56  
6 has not been reviewed. 13:38:59  
7 THE REPORTER: It has not been what?  
8 MS. SHERIDAN: Reviewed. 13:39:01  
9 THE WITNESS: This is the -- 13:39:01  
10 MS. SHERIDAN: At first blush, it would seem 13:39:51  
11 like a very interesting deposition. 13:39:53  
12 BY MR. RICHARDSON:  
13 Q. In addition, there is a July 31st, 2000 letter 13:39:55  
14 from Ms. Frostrom to Mr. Silverman enclosing 13:40:04  
15 advertisements for your review. And these are Bates 13:40:10  
16 stamped as well PX-BS-000695 through 713. 13:40:14  
17 MR. HULBURT: Are these all part of the same 13:40:27  
18 exhibit? 13:40:29  
19 MR. RICHARDSON: Yes. This would be Exhibit 13:40:29  
20 844. 13:40:31  
21 BY MR. RICHARDSON:  
22 Q. Mr. Silverman, am I correct then in stating 13:40:43  
23 that Exhibit 842, which was the earlier set of 13:40:47  
24 documents, comprising 694 or so pages, along with 13:40:52  
25 Exhibit 844 comprises your complete expert work file 13:40:57  
26 in this case? 13:41:01  
27 A. I believe it is. 13:41:02  
28 Q. Are there any -- having reviewed both sets of 13:41:04

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1 documents, are there any documentation that is not 13:41:07  
2 included in either exhibit which would be a part of 13:41:11  
3 your expert work file? 13:41:15  
4 A. Not to my knowledge, no. Do you want this? 13:41:19  
5 Q. Yes, thank you. Mr. Silverman, what opinions 13:41:23  
6 have you reached in this case as an expert? 13:41:50  
7 A. I think the most important opinion I've 13:42:00  
8 reached is that the tobacco industry, through their 13:42:04  
9 marketing practices and through years of 13:42:15  
10 communications, have done all they could to dodge the 13:42:21  
11 bullet on the issue of secondhand smoke. And that, 13:42:27  
12 unfortunately, much work is yet to be done in this 13:42:32  
13 state in terms of communicating the dangers of 13:42:37  
14 secondhand smoke and, most especially, communicating 13:42:42  
15 those dangers in a manner in which people will take 13:42:46  
16 appropriate action to avoid the risks attendant to 13:42:50  
17 secondhand smoke. 13:42:57  
18 I also think that as an expert that I feel -- 13:42:58

19 I feel confident that -- that the public can be 13:43:06  
20 motivated -- a greater percentage of the public can be 13:43:11  
21 motivated to take action in this area to avoid the 13:43:15  
22 consequences of secondhand smoke if an appropriate 13:43:19  
23 communications program, meaning advertising and public 13:43:23  
24 relations and community outreach, and all the various 13:43:26  
25 components thereof, was implemented. 13:43:29

26 Q. Are there any other opinions that you've 13:43:44  
27 formulated for purposes of your expert work in this 13:43:47  
28 case? 13:43:49

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1 A. I believe that, right now, just looking at 13:43:52  
2 current tobacco advertising and looking at the 13:44:00  
3 messaging that the tobacco industry is putting forth 13:44:02  
4 in some of their public communications, such as the 13:44:05  
5 Websites, et cetera, that they aren't doing all they 13:44:07  
6 could to help on this issue. When I say "help," I 13:44:13  
7 mean to successfully -- to create an environment in 13:44:20  
8 which smoking around other people would be regarded as 13:44:25  
9 not normative. 13:44:30

10 Q. Any other opinions, Mr. Silverman, that you've 13:44:42  
11 reached as an expert in this case? 13:44:46

12 A. I don't think so. I'm sure -- I'm sure I have 13:44:56  
13 other opinions. I can't -- I can't elucidate them. 13:44:59

14 Q. Well -- 13:45:05

15 MR. HULBURT: Let me jump in. I think it's 13:45:05  
16 implicit in the second opinion you gave about an 13:45:07  
17 appropriate campaign would be effective, but I also 13:45:09  
18 expect to ask him that, therefore, the plan that he's 13:45:12  
19 developed is his opinion as to what an effective 13:45:15  
20 campaign would be. 13:45:17

21 THE WITNESS: I'm happy to say that, yeah. I 13:45:21  
22 think that the plan that we proposed a year ago is the 13:45:23  
23 basis for an ongoing campaign that would have a 13:45:28  
24 positive effect in this state. 13:45:34

25 BY MR. RICHARDSON:

26 Q. What is a positive effect that you believe the 13:45:47  
27 12-month fund media plan that you've proposed would 13:45:50  
28 have in California? 13:45:55

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1 A. Let me say, the title of that campaign means 13:45:57  
2 that it's a plan to cover 12 months. It doesn't mean 13:46:00  
3 it's a plan that would only run 12 months. It's just 13:46:04  
4 typical of the way media plans are done. You know, 13:46:09  
5 they -- they -- you have to put some parameters on 13:46:12  
6 them in terms of timing. The nature of this kind of 13:46:15  
7 effort is that it's not a one-year effort. You run it 13:46:19  
8 until the problem is solved. And somebody has to 13:46:24  
9 determine at what point have you reached the point of 13:46:28  
10 diminishing returns in an investment. 13:46:31

11 Having said that, what I would -- what I would 13:46:33  
12 be looking for is achieving a significant reduction in 13:46:36  
13 -- excuse me -- a significant reduction in people 13:46:43  
14 smoking in the presence of others where they may be 13:46:46  
15 unintentionally inflicting harm on other people. And 13:46:51  
16 having, you know -- on a short-term basis, I would 13:46:58  
17 have to set some very specific goals. But I think 13:47:04  
18 that it is not unreasonable to reduce the incidence of 13:47:07  
19 people smoking in the presence of others by half 13:47:12  
20 during -- over a three- to four-year period. 13:47:16

21 Q. Do you have a present -- do you have any 13:47:35  
22 knowledge as to how many people percentagewise are 13:47:37  
23 smoking around others in California, as we sit here 13:47:41

24 today? 13:47:44

25 A. I have some knowledge based on the material 13:47:44

26 that I have reviewed in preparation for today. I 13:47:47

27 can't state the specific numbers to you. I don't -- 13:47:55

28 don't memorize them. 13:47:55

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1 Q. Well, can you give me a ballpark what your 13:47:58

2 understanding is with respect to that? 13:48:00

3 A. My understanding is that about 40 to 50 13:48:01

4 percent of all smokers still smoke in the presence of 13:48:03

5 other people. 13:48:05

6 Q. This is with respect to California or 13:48:06

7 national? 13:48:09

8 A. My understanding is that these numbers are 13:48:09

9 California numbers. 13:48:11

10 Q. Do you know how these numbers are derived? 13:48:13

11 A. No. I assume they're taken from various 13:48:15

12 research studies that have been conducted. 13:48:18

13 Q. Now, let's go back and try to carve out the 13:48:21

14 specific opinions that you've reached in this case. 13:48:28

15 But before I do that, I want to ask you a general 13:48:32

16 question. Are you -- are you anticipating testifying 13:48:35

17 at trial about each of the stated opinions you -- you 13:48:39

18 provided? 13:48:43

19 A. I would anticipate that I would be asked 13:48:47

20 questions about that, yes, sir. 13:48:49

21 Q. With respect to the specific opinions you 13:48:51

22 stated, are you intending to state those opinions were 13:48:54

23 there to be a trial in this case at trial? 13:48:59

24 A. Yes. 13:49:03

25 Q. As I understood it -- and I'm paraphrasing, so 13:49:16

26 by all means please correct me -- your first stated 13:49:19

27 opinion was that the tobacco industry, through its 13:49:23

28 practices and years of communications, has done all it 13:49:26

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1 could to dodge the bullet, I believe you put it, on -- 13:49:31

2 with respect to secondhand smoke. Was that a correct 13:49:34

3 summarization? 13:49:38

4 A. I think that's close. 13:49:39

5 Q. Okay. What is the basis of that opinion? 13:49:40

6 A. It is my belief that the tobacco industry has 13:49:53

7 been aware of the health issues connected with their 13:49:56

8 products for many, many, many years. And during the 13:49:59

9 same period of many, many, many years the tobacco 13:50:03

10 industry denied that there were health risks attendant 13:50:06

11 to the use of their products. Secondhand smoke, and 13:50:10

12 the health risks attendant to it, fall into that same 13:50:16

13 framework of, in essence, denial that there are 13:50:22

14 problems with it. I've seen information from the 13:50:29

15 tobacco industry arguing over how many -- over whether 13:50:32

16 or not secondhand smoke in anything other than extreme 13:50:37

17 concentrations is dangerous. Or I've seen arguments 13:50:43

18 from the tobacco industry that -- about, you know, how 13:50:47

19 one calculates how many people may have died from the 13:50:54

20 effects of secondhand smoke, et cetera. But, most 13:50:57

21 importantly, I believe that the tobacco industry, if 13:51:01

22 they were really trying to deal with this problem as a 13:51:06

23 problem, what they would do in their advertising and 13:51:10

24 promotion is recognize that as a lifestyle product how 13:51:14

25 they portray smoking in their advertising sends a 13:51:17

26 very, very strong signal about how one should use the 13:51:25

27 product and what is appropriate and what is not 13:51:29

28 appropriate. 13:51:31

1 And when I say "dodge the bullet," by that I 13:51:33  
 2 mean that if the tobacco industry really wanted to 13:51:37  
 3 contribute to the public health and welfare, their 13:51:40  
 4 current advertising would certainly look different and 13:51:47  
 5 act different, sound different in its style and in the 13:51:49  
 6 messages it has. Also, even the messages that they 13:51:52  
 7 put out on their Websites, each company has different 13:51:57  
 8 statements. One would think that tobacco is tobacco. 13:52:01  
 9 One would think that there would be a consistency of 13:52:04  
 10 message in this regard, but there isn't, from company 13:52:07  
 11 to company. So if you were trying very, very hard -- 13:52:09  
 12 the industry was trying very, very hard to really send 13:52:15  
 13 the right signals, say the right things the right way, 13:52:18  
 14 one would think they would find some common ground. 13:52:20  
 15 But they don't seem to do it, although they all seem 13:52:23  
 16 to be in this room one way or another. 13:52:27

17 Q. So in part the basis of your opinion 13:52:31  
 18 concerning the tobacco industry dodging the bullet 13:52:33  
 19 with respect to secondhand smoke is the public 13:52:38  
 20 statements the tobacco companies have made heretofore; 13:52:42  
 21 is that correct? 13:52:46

22 A. That's correct. 13:52:47

23 Q. The ads that the companies have run? 13:52:47

24 A. The ads that they are currently running. 13:52:49

25 Q. Okay. And public statements concerning the 13:52:57  
 26 health effect of whether it's extreme or not 13:53:01  
 27 concentrations of secondhand smoke? 13:53:05

28 A. My problems with it are not the specifics that 13:53:08

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1 you just mentioned as much as the inconsistencies that 13:53:09  
 2 exist which tend to obfuscate the facts. 13:53:13

3 Q. Have you seen anything that -- have you seen 13:53:17  
 4 or heard anything that the tobacco companies have done 13:53:23  
 5 or said that's contrary to what you stated? 13:53:26

6 A. I've seen various messages from the tobacco 13:53:31  
 7 industry in which they are attempting to say that 13:53:33  
 8 they're now going to lead blameless lives. I just 13:53:38  
 9 don't -- they say that, but their actions don't seem 13:53:43  
 10 to be consistent with those statements. 13:53:46

11 Q. What actions are you referring to? 13:53:50

12 A. Their marketing actions, their advertising 13:53:52  
 13 actions. 13:53:54

14 Q. Can you give me examples. 13:53:55

15 A. I think if you -- if you don't think it's a 13:53:57  
 16 good idea to smoke in the presence of other people, 13:54:03  
 17 don't portray people smoking in the presence of other 13:54:04  
 18 people in your own advertising, because you're sending 13:54:08  
 19 a signal that this is an acceptable and normative 13:54:09  
 20 behavioral pattern. If you think that smoking indoors 13:54:21  
 21 is something that's risky, and in the State of 13:54:21  
 22 California, in general, smoke-free workplaces are the 13:54:25  
 23 rule, and the advice to people is to avoid smoking 13:54:30  
 24 indoors, don't portray advertising scenes that show 13:54:37  
 25 indoor environments where smoking is taking place. I 13:54:41  
 26 believe that what you're doing is sending 13:54:42  
 27 contradictory messages -- or not you, excuse me, Mr. 13:54:44  
 28 Richardson, but rather your clients. This obviously 13:54:47

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1 varies from advertiser to advertiser and brand to 13:54:51  
 2 brand. 13:54:54

3 Q. Are you aware of any contrary opinions -- any 13:54:55  
 4 opinions contrary to yours on this issue, and, as 13:55:01



5 we've been phrasing it, that is the tobacco industry 13:55:05  
6 dodging the bullet with regard to secondhand smoke? 13:55:09  
7 A. I'm sure that the tobacco industry doesn't 13:55:12  
8 hold the same opinions I do. 13:55:14  
9 Q. Anyone else? 13:55:17  
10 A. I'm not aware of others. 13:55:21  
11 Q. So the only awareness you have of any contrary 13:55:22  
12 opinions with respect to your own, concerning the 13:55:26  
13 tobacco industry engaging in practices in which it has 13:55:28  
14 done all it could to dodge the bullet with respect to 13:55:34  
15 secondhand smoke, is the tobacco companies' positions 13:55:36  
16 themselves? 13:55:40  
17 THE REPORTER: Did you say "physicians"? 13:55:49  
18 MR. RICHARDSON: "Positions." 13:55:51  
19 THE WITNESS: That, to me, is the most 13:55:51  
20 important factor. There are certainly other people 13:55:53  
21 that hold the same opinion I do, whose opinions I 13:55:57  
22 think are valid, and are based on substantive 13:56:01  
23 examination of the record and activity, et cetera. 13:56:07  
24 BY MR. RICHARDSON: 13:56:12  
25 Q. In reaching your opinion -- 13:56:13  
26 MR. KAPLAN: He didn't answer the question you 13:56:18  
27 asked him. You asked him whether he knew of people 13:56:19  
28 with a contrary opinion, and he answered as to people 13:56:22

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1 with the same opinion. Can I get him to answer the 13:56:25  
2 question that you asked? 13:56:28  
3 BY MR. RICHARDSON:  
4 Q. Did you understand -- 13:56:29  
5 A. I'm sorry.  
6 Q. -- Mr. Kaplan's point? 13:56:29  
7 A. Could you please go back and ask whichever 13:56:32  
8 question, and I will try to answer. 13:56:34  
9 Q. Okay. Let me rephrase it. Perhaps I may have 13:56:36  
10 missed your response. Let's see. Other than the 13:56:38  
11 tobacco companies' positions as you stated them, are 13:56:54  
12 you aware of any contrary opinions with respect to 13:57:01  
13 your own concerning the tobacco industry engaging in 13:57:04  
14 practices in which it has done all it could to dodge 13:57:09  
15 the bullet with respect to secondhand smoke? 13:57:13  
16 A. I'm trying to understand the question. It's 13:57:23  
17 fairly complex in the way you phrased it. If you're 13:57:26  
18 asking me am I aware of opinions contrary to my own 13:57:29  
19 that are not directly from the tobacco industry, I 13:57:36  
20 have read opinions that are in support of the tobacco 13:57:39  
21 industry, though they appear to be experts retained by 13:57:43  
22 the tobacco industry who speak, you know, under 13:57:46  
23 sponsorship, in essence, of the tobacco industry. 13:57:50  
24 Q. Okay. 13:57:53  
25 A. I've read some of that material. 13:57:53  
26 Q. Are you aware of any contrary opinions that 13:57:56  
27 are not associated in any way with the tobacco 13:57:58  
28 companies? 13:58:03

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1 A. Opinions of what? 13:58:11  
2 Q. Opinions concerning the tobacco industry, 13:58:12  
3 through its practices over the years, doing all it 13:58:15  
4 could to dodge the bullet on secondhand smoke. 13:58:18  
5 A. No. No, I'm not. 13:58:21  
6 Q. Okay. Have you attempted to research the 13:58:25  
7 issue with respect to contrary opinions that are not 13:58:30  
8 associated with the tobacco company -- provided by 13:58:38  
9 others not associated with the tobacco company? 13:58:41

10 A. No. 13:58:43

11 Q. In reaching your -- in coming to your opinion 13:58:46

12 concerning -- and I hate to use the long litany. I 13:58:50

13 wish there was a shorthand way I could put it. But to 13:58:54

14 make the record clear, in coming to your opinion 13:58:57

15 concerning the tobacco industry, through its practices 13:58:59

16 over the years, having done all it could to dodge the 13:59:01

17 bullet on secondhand smoke, were there any assumptions 13:59:04

18 you made to reach that conclusion? 13:59:07

19 A. Well, my experience in the past ten years has 13:59:21

20 demonstrated that the tobacco industry has done -- has 13:59:26

21 repeatedly attempted to damage smoke-free workplace 13:59:31

22 laws, has actively participated in ballot measure 13:59:37

23 campaigns that would have the effect of either rolling 13:59:47

24 back or discouraging smoke-free workplace laws. Has 13:59:51

25 campaigned against other ballot measure initiatives 13:59:58

26 and state initiatives and local initiatives that would 14:00:04

27 create smoke-free environments. So it's -- it's a 14:00:07

28 compendium of experience over the past decade that has 14:00:19

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1 led me to that conclusion. I don't think I can, you 14:00:24

2 know, give you a discrete list of this factor, this 14:00:29

3 factor, this factor, this factor, but it certainly 14:00:35

4 appears to me that the weight of the evidence 14:00:41

5 certainly supports the view I've stated. 14:00:42

6 Q. You mentioned the industry's attempt to damage 14:00:47

7 the smoke-free laws and otherwise campaign against 14:00:50

8 initiatives that would create smoke-free environments. 14:00:58

9 Do you have some specific -- do you have some specific 14:01:03

10 conduct in mind? 14:01:11

11 A. I think if we go back to -- was it Prop 103? 14:01:13

12 Does anybody here -- nobody is going to answer me, 14:01:18

13 obviously. 14:01:22

14 MR. HULBURT: Prop 103 was about insurance. 14:01:23

15 THE WITNESS: No, not 103. Which was the -- 14:01:25

16 which was the Philip Morris initiative that they tried 14:01:27

17 very hard to not make a Philip Morris initiative? I 14:01:30

18 can't remember the name of it, I'm sorry, but it was a 14:01:33

19 statewide initiative that would have had the effect of 14:01:41

20 making the statewide -- the -- restricting the ability 14:01:41

21 of local communities to create smoke-free 14:01:45

22 environments. All sorts of information that's been 14:01:49

23 published during the years questioning the validity of 14:01:54

24 various scientific studies, questioning the motives of 14:01:58

25 people who were doing it. That's what I've seen. 14:02:02

26 BY MR. RICHARDSON:

27 Q. Is that conduct that the industry is presently 14:02:07

28 engaged in as well? 14:02:09

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1 A. I -- I believe it may be engaged in that now. 14:02:13

2 When you look at the most recently, the ones I can 14:02:16

3 think of was initiatives that were intending to 14:02:25

4 overturn the smoke-free law as it applied to bars. 14:02:30

5 Clearly the tobacco industry was trying to overturn 14:02:36

6 that. And other -- and other examples of that. 14:02:39

7 Though, you know, my job is not to determine whether 14:02:44

8 there is a problem. My job is to determine how I can 14:02:52

9 fix it. 14:02:56

10 Q. But you have determined that there is a 14:02:57

11 problem, have you not, because you are expressing an 14:02:59

12 opinion that the tobacco industry has engaged over 14:03:02

13 many years in conduct in which it, as you put it, is 14:03:07

14 intending to dodge a bullet on secondhand smoke? 14:03:12

15 A. Yes. 14:03:16

16 Q. Okay. Again, paraphrasing, the second opinion 14:03:16

17 I heard you state that you're prepared to offer as an 14:03:29

18 expert in this case is that a greater percentage of 14:03:34

19 the public can be motivated to take action with 14:03:38

20 respect to secondhand smoke and to avoid its 14:03:42

21 consequences. Is that an accurate statement? 14:03:45

22 A. Yes. 14:03:48

23 Q. Okay. What is the basis of your opinion with 14:03:49

24 respect to that? 14:03:53

25 A. The purpose of the statewide advertise -- the 14:04:01

26 statewide media campaigns -- tobacco use prevention 14:04:08

27 campaigns has been to prevent the use of tobacco to -- 14:04:12

28 literally, the stated objective, as I recall, was to 14:04:16

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1 reduce uptake, meaning the beginning of smoking, and 14:04:21

2 to increase cessation efforts. Various strategies 14:04:26

3 were employed to affect that change. When it came to 14:04:31

4 advertising, secondhand smoke was a component, and 14:04:37

5 messages about secondhand smoke, which represented a 14:04:42

6 small minority of the overall campaign effort, were 14:04:46

7 included. But the objective of using secondhand smoke 14:04:51

8 messages in those campaigns was not the same as the 14:04:55

9 objective we're talking about today at all. The 14:04:59

10 objective in using secondhand smoke messages was to 14:05:03

11 provide rational reasons for what ultimately was an 14:05:07

12 emotional lifestyle-driven decision. 14:05:11

13 There was never an objective, nor were there 14:05:18

14 ever strategies, nor were there ever executions, nor 14:05:21

15 was there ever media campaigns run specifically to get 14:05:25

16 people who smoke to change the way they smoke, where 14:05:29

17 they smoke, how they smoke around others. Since that 14:05:34

18 has never been set out, nobody ever set out to do 14:05:39

19 that, one can't expect to get a great result from 14:05:43

20 something you weren't trying to achieve. But it is 14:05:47

21 clear from the record of the past ten years is that 14:05:51

22 these campaigns can work, if they are directed to a 14:05:56

23 specific objective. So my view is that if the 14:06:01

24 objective is to try to get people who do choose to 14:06:05

25 smoke to smoke in a more responsible manner, that 14:06:10

26 there is good reason to believe that advertising or 14:06:18

27 that -- that social marketing campaign could be 14:06:21

28 successful. 14:06:25

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1 Q. The social marketing campaigns from the past, 14:06:28

2 and perhaps even the current ones, are ones that were 14:06:31

3 generally directed to people quitting smoking, but not 14:06:35

4 specifically directed to the effects of secondhand 14:06:39

5 smoke; is that what you're saying? 14:06:42

6 A. No, I'm not saying that. The primary 14:06:44

7 objective of the statewide campaigns that have existed 14:06:50

8 in California have been preventive, not quitting, not 14:06:53

9 focused on cessation. The primary effect has been to 14:06:58

10 try to persuade people to not start smoking. Once 14:07:02

11 people start smoking, it's pretty darn hard to stop. 14:07:05

12 There have been efforts, and part of the campaign has 14:07:09

13 involved cessation, but it's been a small part. 14:07:12

14 Because it's generally been recognized that 14:07:15

15 advertising is not a primary vehicle to get people to 14:07:18

16 quit. There are other factors and other ways you do 14:07:22

17 that. 14:07:25

18 But advertising and public relations and 14:07:26

19 various social marketing strategies and tactics can 14:07:28

20 play a profound role in reducing -- reducing 14:07:34  
21 prevalence rates among the general population, among 14:07:38  
22 kids, and -- and -- and special audiences, minority 14:07:41  
23 audiences. In California secondhand smoke played a 14:07:47  
24 role in the efforts to reduce smoking consumption, 14:07:52  
25 reduce the incidence of smoking, and it played a 14:07:57  
26 strategic role in that process. But, you know, it -- 14:08:01  
27 what we're talking about here is really sort of a 14:08:09  
28 different thing. 14:08:12

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1 If I was to make an analogy to a commercial 14:08:13  
2 product -- and I'll use Philip Morris, and some of 14:08:16  
3 Philip Morris's lawyers are here -- Philip Morris 14:08:26  
4 sometimes does advertising to make people think, well, 14:08:26  
5 that Philip Morris is a company. But that advertising 14:08:29  
6 doesn't do anything at all to sell Maxwell House 14:08:31  
7 coffee, any more than it has anything to do selling 14:08:35  
8 Marlboro cigarettes or Kraft cream cheese. That's -- 14:08:38  
9 the state prevention campaigns have had a prevention 14:08:42  
10 goal, okay. Secondhand smoke was a reason why in that 14:08:46  
11 campaign, but nobody was seeking a behavioral change 14:08:53  
12 regarding secondhand smoke. 14:08:57

13 Q. Are you suggesting that the 12-month fund 14:09:00  
14 media plan has as a specific objective behavioral 14:09:06  
15 change as it relates to exposure to secondhand smoke? 14:09:14

16 A. Yes. 14:09:19

17 Q. Okay. And you're also saying it's your 14:09:22  
18 opinion that that objective has not been one that has 14:09:24  
19 been a part and parcel of the tobacco use prevention 14:09:29  
20 campaigns in the past? 14:09:34

21 A. It's been an objective, but it has not been -- 14:09:36  
22 it has certainly not been a primary objective. It has 14:09:39  
23 not been forcefully promoted. It has not been 14:09:42  
24 extensively funded. It has been a -- actually a 14:09:46  
25 relatively minor component. 14:09:52

26 Q. Okay. A third element, as I understood it, of 14:09:55  
27 your opinion is that the tobacco companies are not 14:10:00  
28 doing all they can to create an environment in which 14:10:01

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1 smoking around others would be regarded as normative; 14:10:04  
2 is that a correct statement? 14:10:09

3 A. Yes, I think that's correct. 14:10:12

4 Q. What is the basis of that opinion? 14:10:14

5 A. Basis of that opinion is primarily, as an 14:10:16  
6 advertising expert, looking at -- looking at their own 14:10:19  
7 advertising. When I say "their," I mean the tobacco 14:10:24  
8 industry's advertising, but specifically brand focused 14:10:27  
9 advertising. 14:10:30

10 Q. And the final aspect of your opinion that I 14:10:47  
11 was able to get from your statement is that the 14:10:52  
12 12-month fund media plan that you developed would 14:10:57  
13 achieve significant reductions in people smoking 14:11:07  
14 around others where they may be unintentionally 14:11:10  
15 inflicting harm on others; is that correct? 14:11:13

16 A. I believe that to be true. I don't believe 14:11:16  
17 that -- I don't believe that anybody wants to inflict 14:11:17  
18 harm on other people. 14:11:22

19 Q. What is the basis of your belief that the 14:11:24  
20 12-month fund media plan as it's constituted would 14:11:26  
21 achieve that result? 14:11:29

22 A. Well, first of all, it's -- it's an unusual 14:11:34  
23 plan. Well, first of all, let me go back to the 14:11:36  
24 objectives, if that's okay. 14:11:41

25 Q. Sure. 14:11:44

26 A. As I stated earlier today, the purpose of 14:11:45

27 advertising -- the purpose of marketing is never 14:11:50

28 simply to make people aware of a product, of a 14:11:54

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1 service, make people aware of a problem. What you're 14:11:57

2 always trying to do is to motivate people to take 14:12:01

3 action. And in -- there has been little effort made 14:12:04

4 in this state, or in any other state that I'm aware 14:12:13

5 of, to get people to change their -- to get smokers to 14:12:16

6 really change their behavior when it comes to smoking 14:12:23

7 around other people. That doesn't mean that it hasn't 14:12:29

8 been dramatized. That doesn't mean that it hasn't 14:12:32

9 been shown. That doesn't mean it hasn't been referred 14:12:34

10 to. But they -- there hasn't been a concerted effort 14:12:37

11 made. 14:12:43

12 To the best of my knowledge, there has never 14:12:44

13 been a tobacco use prevention campaign that was 14:12:47

14 zero-based budgeting. "Zero-based budgeting" meaning 14:12:52

15 figure out what needs to be done, figure out how much 14:12:56

16 -- how much it would cost to do that, and then budget 14:13:00

17 accordingly. Rather all these -- all of these 14:13:02

18 campaigns have been budgeted based on funds that have 14:13:06

19 been made available from either tax dollars, 14:13:09

20 settlement dollars, volunteer dollars, or what have 14:13:14

21 you, but they're finite. Which means that, by 14:13:17

22 definition, all of those campaigns are compromises. 14:13:22

23 They do the best they can do, given the resources they 14:13:26

24 have to do it. 14:13:28

25 One of the things about this campaign as -- or 14:13:30

26 this plan as we laid it out, is that it was a 14:13:34

27 zero-based plan. We set out certain goals, and we 14:13:37

28 said, "What's it going to take to really achieve these 14:13:41

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1 goals?" So from a financial standpoint, in my 14:13:44

2 opinion, adjusting for media inflation and other 14:13:51

3 factors related to that, the plan, as we laid it out, 14:13:56

4 would be the beginning of an effective plan to reduce 14:14:01

5 tobacco use in -- in the area that creates secondhand 14:14:05

6 smoke problems. 14:14:09

7 Does that mean that a 12-month campaign would 14:14:12

8 do the job? No. As I also stated, it's simply what 14:14:14

9 -- year one of an ongoing program. But based on what 14:14:19

10 we know about how we reach audiences, based on our 14:14:23

11 experience with products and services, based on our 14:14:28

12 experience with other tobacco use prevention 14:14:33

13 campaigns, in my view the plan, as constituted, 14:14:35

14 coupled with appropriate creative messaging, would 14:14:40

15 have a desired effect and would achieve the objective 14:14:43

16 of reducing the number of people -- significantly 14:14:46

17 reducing the number of people who smoke in front of 14:14:49

18 their children, who smoke in front of other people who 14:14:53

19 may be at risk. 14:14:55

20 Q. Why has there never been a tobacco use 14:14:57

21 prevention campaign that was zero-based budgeted? 14:15:00

22 A. Where would the money come from? I -- the -- 14:15:07

23 I can speak more about California than any other 14:15:11

24 place. The Prop 99 budget was derived from taxes on 14:15:14

25 cigarette sales as mandated by Prop 99 back in 1989. 14:15:21

26 A percentage of that was allocated to a statewide 14:15:27

27 education campaign. Part of those dollars were 14:15:31

28 supposed to go to media. On a zero base -- on a 14:15:35

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1 zero-based -- if a zero-based plan had been 14:15:43  
2 considered, the amount of money that was allocated 14:15:46  
3 from the get-go probably would not have been adequate. 14:15:48  
4 But the fact of the matter is, the plan -- the budget 14:15:51  
5 was never funded -- was never funded up to what it was 14:15:55  
6 supposed to be funded to because of the way the 14:16:00  
7 various administrations and legislature allocated the 14:16:02  
8 dollars. They never met their -- they never even met 14:16:05  
9 what the voters voted for. 14:16:08  
10 Q. In order for your 12-month fund media plan to 14:16:10  
11 achieve its stated objectives, where do you expect the 14:16:14  
12 funds to come from for the zero-based budgeting? 14:16:20  
13 A. My understanding is that that is what this 14:16:25  
14 lawsuit is about. 14:16:27  
15 Q. What is your understanding? 14:16:29  
16 A. My understanding is that -- that if the 14:16:30  
17 plaintiffs are successful, the tobacco industry would 14:16:35  
18 in some fashion fund a campaign to achieve these 14:16:37  
19 results. 14:16:42  
20 Q. And it would be funded in such a way that it's 14:16:44  
21 -- as you put it, would be zero-based? You would -- 14:16:47  
22 A. That a sufficient sum would be allocated to -- 14:16:52  
23 to achieve the results as it happens based on a 14:16:55  
24 zero-based budgeting parameter. It's the way we 14:16:58  
25 approached it. It's the way we were asked to approach 14:17:02  
26 it. 14:17:04  
27 Q. Let me back up. Can you explain what you mean 14:17:05  
28 by zero-based budgeting. 14:17:07

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1 A. Yes. 14:17:09  
2 MR. HULBURT: That's asked and answered. He 14:17:10  
3 did explain that. 14:17:11  
4 BY MR. RICHARDSON:  
5 Q. Well, if you would indulge me and explain. 14:17:12  
6 How do you define zero-based budgeting? 14:17:16  
7 A. I define zero-based budgeting by identifying 14:17:18  
8 what I'm trying to achieve and saying, "This is what 14:17:22  
9 it would cost me to achieve this goal." As opposed to 14:17:27  
10 a budget based or limited budget based plan where we 14:17:34  
11 are told, "This is what we would like to achieve. 14:17:39  
12 Here's how much money we have available. How close to 14:17:42  
13 the goal can we get?" In -- I don't know of any 14:17:45  
14 tobacco use campaigns that have ever been zero-based, 14:17:55  
15 ever. I'm just not aware of any. You're given -- 14:18:00  
16 you're given an amount of money and do your best with 14:18:05  
17 it. 14:18:08  
18 Q. Is it also your opinion that past tobacco use 14:18:14  
19 prevention campaigns concerning, for example, 14:18:22  
20 anti-tobacco ads have just not been sufficient to 14:18:29  
21 reach the objective that you intend to reach with the 14:18:33  
22 12-month fund media plan? 14:18:37  
23 A. I believe that past campaigns have been 14:18:48  
24 reasonably successful in achieving their objectives. 14:18:51  
25 The objectives are not the same as the objectives of 14:18:55  
26 this 12-month media plan. I believe that -- when I 14:18:58  
27 say "reasonably successful," they've been as 14:19:03  
28 successful as -- they've been more or less as 14:19:06

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1 successful as they can be within the budgets they are 14:19:09  
2 -- they are restricted to working within. 14:19:14  
3 I'll make a simple example. Tobacco is a 14:19:18  
4 product that's purchased every single day. In fact, 14:19:24  
5 most smokers actually buy a pack of cigarettes -- you 14:19:28

6 know, smoke a pack a day, three-quarters of a pack a 14:19:30  
7 day, a pack and a half a day. They may buy it by -- 14:19:33  
8 they may buy a carton of cigarettes. They may buy it 14:19:38  
9 individually. But basically it's an everyday sort of 14:19:42  
10 purchase. There's no great seasonality to it. You 14:19:44  
11 don't smoke more in the winter than you do in the 14:19:47  
12 summer particularly. So it's every day sort of 14:19:51  
13 purchasing. 14:19:52  
14 What the tobacco industry has done from time 14:19:53  
15 of memorial is recognize that fact. So their 14:19:56  
16 advertising is consistent on a 12-month basis, 52-week 14:19:59  
17 basis, you know, the advertising keeps going. Because 14:20:03  
18 part of their strategy, clearly, is to make the 14:20:07  
19 portrayal of tobacco use as pervasive as possible. It 14:20:09  
20 equates to what advertising people would call a 14:20:15  
21 recency scheduling approach. 14:20:17  
22 I don't know of any tobacco use prevention 14:20:23  
23 campaigns that have been able to run 52-week 14:20:25  
24 schedules. I don't know any tobacco use prevention 14:20:28  
25 campaigns that have been able to use all the media 14:20:31  
26 forms that might be available to effectively reach the 14:20:34  
27 effected populations. I don't know any tobacco use 14:20:37  
28 prevention campaigns that have ever had the money to 14:20:40

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1 do that. You know, the State of California spends a 14:20:43  
2 tiny fraction of what the tobacco industry spends in 14:20:48  
3 the state of California on advertising and promotion. 14:20:51  
4 If you look at it on a rather simplistic basis of 14:20:54  
5 dollar-for-dollar marketing/ counter-marketing, 14:20:59  
6 tobacco industry wins every time, just on -- on having 14:21:02  
7 more bullets in their gun. So a zero-based budget 14:21:06  
8 gives you the opportunity to do as good a job as 14:21:13  
9 advertising professionals know how to do. That's what 14:21:24  
10 it is. 14:21:24  
11 Q. With respect to the first opinion we were 14:21:24  
12 discussing, that is, that the tobacco industry, 14:21:27  
13 through its practices, have done all it could to dodge 14:21:29  
14 a bullet with respect to secondhand smoke, when did 14:21:33  
15 you formulate that opinion? When did you come to that 14:21:36  
16 conclusion? 14:21:40  
17 A. I really don't know. I really don't know. 14:21:49  
18 I've worked -- I really don't know. 14:21:53  
19 Q. Did you come to that conclusion at some point 14:21:58  
20 after you were retained as an expert in this case? 14:22:00  
21 A. No. 14:22:03  
22 Q. So you -- that was your opinion before you 14:22:04  
23 were retained as an expert in this case? 14:22:06  
24 A. I was retained as an expert in this case 14:22:09  
25 because of my work in tobacco use prevention 14:22:11  
26 advertising. So I didn't -- on -- on whatever that 14:22:13  
27 date was last year, June 15th, 1999, I didn't suddenly 14:22:18  
28 say, "Gee, how am I going to think about tobacco and 14:22:23

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1 the consequences of tobacco marketing?" I've been 14:22:25  
2 thinking about it for more than half a decade 14:22:30  
3 intensively. 14:22:36  
4 Q. So, then, your opinion is one that you 14:22:38  
5 formulated sometime before you became an expert in 14:22:40  
6 this case, correct? 14:22:43  
7 A. I believe that to be true. I think that's a 14:22:44  
8 fair statement. 14:22:47  
9 Q. Okay. With respect to your opinion concerning 14:22:47  
10 the greater percentage of the public being able to be 14:22:49

11 motivated to take action with respect to avoiding the 14:22:52  
12 consequences of secondhand smoke, when did you reach 14:22:56  
13 that conclusion? 14:22:59

14 A. In general, I reached the conclusion that much 14:23:07  
15 more could be done in the area of tobacco use 14:23:11  
16 prevention some years ago, when I became aware of how 14:23:15  
17 insufficient the programs were to get the job done. 14:23:25  
18 Good, well-conceived programs, but not enough bucks 14:23:30  
19 behind them to do all that could have been done if 14:23:36  
20 there had been more dollars available. 14:23:38

21 Very specifically on this issue, I hadn't 14:23:40  
22 really thought that much prior to being asked to join 14:23:43  
23 this -- to be involved in this about what would happen 14:23:46  
24 if you set out to try to get smokers to change their 14:23:52  
25 behavioral pattern. Because it hadn't been part of 14:23:57  
26 the assignments I had been working on prior to that. 14:24:01  
27 I suppose it could have been. There wouldn't have -- 14:24:04  
28 just wouldn't have been any dollars to do it. There 14:24:07

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1 were other jobs that the State of California placed a 14:24:09  
2 higher priority on. 14:24:13

3 Q. But wasn't the focal point of the tobacco use 14:24:15  
4 prevention campaigns in the past to change behavior? 14:24:19

5 A. Yes, but the behavioral change they sought was 14:24:24  
6 to reduce the incidence of people starting smoking. 14:24:27  
7 The -- the idea here is somewhat different, and that 14:24:36  
8 is to better protect people who are around smokers by 14:24:40  
9 encouraging smokers to take different actions than 14:24:48  
10 they -- than they had been taking. It's a much more 14:24:52  
11 focused -- much more focused objective, very specific 14:24:57  
12 objective. 14:25:03

13 (Exhibit 845 was marked for identification.)

14 BY MR. RICHARDSON:

15 Q. Mr. Silverman, I'm handing you what we'll have 14:25:06  
16 marked as Exhibit 845. It's a document entitled 14:25:34  
17 "Environmental Tobacco Smoke Warning 12-month Fund 14:25:40  
18 Media Plan." It has Bates stamp numbers PX-BS-000056 14:25:46  
19 through -- and it seems to be consecutively paginated 14:25:53  
20 -- 000178, and ask you to review that. 14:26:06

21 A. Thank you. 14:26:16

22 Q. You're welcome. Everybody's got it. 14:26:17

23 MR. HULBURT: Are you asking him to read this 14:27:20  
24 now, or do you want -- 14:27:22

25 MR. RICHARDSON: No, no. I -- 14:27:23  
26 THE WITNESS: I've read this. 14:27:24

27 BY MR. RICHARDSON:

28 Q. Okay. Would you tell me what this is. 14:27:24

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1 A. This document is the -- this environment -- 14:27:29  
2 this document is entitled "Environmental Tobacco Smoke 14:27:32  
3 Warning 12-month Fund Media Plan." It was prepared by 14:27:36  
4 the staff at Western Initiative Media in July of 1999, 14:27:40  
5 and it was prepared at the request of and delivered to 14:27:44  
6 Preston Gates & Ellis. It is a media plan that 14:27:47  
7 incorporates -- it is -- it is, as stated, a media 14:27:52  
8 plan that would have the effect of supporting an 14:27:57  
9 advertising effort as part of an overall social 14:28:03  
10 marketing campaign on the subject of secondhand smoke. 14:28:06

11 Q. How was this 12-month fund media plan 14:28:15  
12 conceived? 14:28:19

13 A. Are you -- are you asking what the process 14:28:26  
14 was? 14:28:27

15 Q. Yes. 14:28:28



16 MR. HULBURT: Didn't you already -- didn't you 14:28:31  
17 already do that? He went through eight steps of 14:28:32  
18 exactly how that went. I mean, you did that this 14:28:35  
19 morning. 14:28:39  
20 BY MR. RICHARDSON: 14:28:39  
21 Q. Well, let me be a bit more specific. What 14:28:39  
22 investigation went into the creation of this 12-month 14:28:43  
23 fund media plan? This plan, separate and apart from 14:28:46  
24 any others. 14:28:50  
25 A. Based on the objective that was given to us, 14:28:52  
26 which was to reduce the harmful effects of secondhand 14:28:57  
27 smoke by getting people to change their behavior when 14:29:01  
28 they're smoking, or when they're in and around smoking 14:29:06  
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1 -- when they are smoking or when they're around 14:29:09  
2 smokers. The plan was researched by looking at as 14:29:11  
3 much available -- as much information as was available 14:29:20  
4 and was usable during the limited amount of time that 14:29:24  
5 was given to prepare the plan. As I recall, the 14:29:28  
6 assignment was initiated on -- based on the memo that 14:29:35  
7 I saw earlier today, on the 2nd of July, and this plan 14:29:39  
8 is dated the 14th of July. So pretty intensive 12 14:29:47  
9 days to prepare it. 14:29:50  
10 In going through the plan, you'll see the 14:29:50  
11 various research -- various information that's cited 14:29:53  
12 in support of understanding the problem. You'll see 14:29:58  
13 various information that is cited in terms of other 14:30:04  
14 programs, other campaigns, other media campaigns 14:30:09  
15 especially, that have been used successfully, or 14:30:12  
16 partially successfully, in similar campaigns. And 14:30:16  
17 then you will see information referencing conceptual 14:30:21  
18 media strategies and support for the tactics that are 14:30:27  
19 recommended. And that is based, again, on media 14:30:32  
20 research information in possession of Initiative 14:30:35  
21 Media. That is also available publicly in the form of 14:30:40  
22 syndicated research information on viewership, 14:30:43  
23 readership, et cetera, of various media forms. 14:30:48  
24 Q. I note on the cover sheet that it's dated July 14:30:57  
25 14th, 1999. Have there been any additional versions 14:31:04  
26 of this plan since July 14th, 1999 that you developed? 14:31:11  
27 A. No. 14:31:20  
28 Q. Since July 14th, 1999 is there any information 14:31:20  
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1 that's in this plan that has been changed or altered 14:31:24  
2 in some way? 14:31:27  
3 A. No. 14:31:28  
4 Q. Let me direct you to what is Bates stamped 14:31:33  
5 numbered page PS-BX-73 in Exhibit 845. 14:31:38  
6 A. "Objectives"? 14:31:52  
7 Q. Yes, there's reference to the objectives of 14:31:53  
8 the plan. And directing you to the second bullet 14:31:57  
9 point, there's an expression "aggressive weight." Do 14:32:01  
10 you see that? 14:32:07  
11 A. Uh-huh. 14:32:07  
12 Q. What does that mean? 14:32:07  
13 A. Aggressive weight is a subjective term. When 14:32:10  
14 you can do -- what you try to achieve in advertising 14:32:18  
15 campaigns of this nature is what's called effective 14:32:22  
16 reach, meaning reaches the percentage of the target 14:32:25  
17 populations that you -- that you're attempting to 14:32:30  
18 reach, that you can -- that you have reached. And 14:32:33  
19 then with a certain frequency of messaging against 14:32:36  
20 them. You can be -- you can be more or less 14:32:40

21 aggressive in who you're trying to reach, the 14:32:47  
22 percentage of the population you're trying to reach, 14:32:50  
23 and you can be more or less aggressive in the 14:32:53  
24 repetition of messaging to them. 14:32:55  
25 Our experience in doing campaigns of this 14:32:58  
26 nature is that the more messages, meaning the more 14:33:02  
27 discreet pieces of information provided, not 14:33:07  
28 necessarily having many, many ads running, but more 14:33:10

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1 messages, more different messages running in support 14:33:15  
2 of a proposition tends to work better. Therefore, we 14:33:19  
3 would opt, as we did here, we recommended here running 14:33:23  
4 a more aggressive kind of a campaign than a less 14:33:26  
5 aggressive kind of campaign, meaning do not seek out 14:33:31  
6 minimum weight levels, but rather go for more 14:33:33  
7 aggressive weight levels. If I was to try to index 14:33:36  
8 them on a scale of 1 to 10, 5 being in the middle, an 14:33:39  
9 aggressive campaign might be a 7, a minimal campaign 14:33:45  
10 might be a 4. 14:33:50

11 Q. On page 3 of Exhibit 8 -- page 73 of Exhibit 14:33:51  
12 845, these are the stated objectives of the plan; is 14:33:56  
13 that correct? 14:34:02

14 A. These are objectives of the media plan. 14:34:03

15 Q. Of the media plan, correct? 14:34:06

16 A. Right. 14:34:09

17 Q. How was it determined that these would be the 14:34:09  
18 objectives of the media plan? 14:34:11

19 A. These were objectives that were reached in -- 14:34:13  
20 in discussions with Preston Gates & Ellis. The main 14:34:16  
21 objective -- and it's written right here. The primary 14:34:22  
22 objective, ultimate objective is to reduce the 14:34:26  
23 incidence of secondhand smoke. But you're looking at 14:34:29  
24 media objectives which are different than advertising 14:34:36  
25 objectives, or creative objectives. They're different 14:34:39  
26 because the disciplines are different within 14:34:44  
27 advertising. 14:34:46

28 You know, step one in this, if the ultimate 14:34:46

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1 objective -- or actually the ultimate campaign 14:34:51  
2 objective, which is a marketing objective, is to 14:34:53  
3 reduce the use of secondhand smoke; in the media 14:34:57  
4 context that would be communicating the campaign 14:35:00  
5 message, providing continuity, and supporting the 14:35:01  
6 community based public relations programs -- 14:35:08

7 Q. Okay. 14:35:10

8 A. -- that I've mentioned. 14:35:10

9 Q. What measures -- how would one measure the 14:35:12  
10 effectiveness of the media campaign in achieving its 14:35:20  
11 objectives as stated on page 73? 14:35:24

12 A. There are two methodologies that could be 14:35:28  
13 explored. And they would be exploring different -- 14:35:30  
14 they'd really be exploring different things. You 14:35:35  
15 could measure the effectiveness of the media component 14:35:37  
16 of the overall marketing campaign by trying to 14:35:41  
17 establish whether or not you have reached your target 14:35:45  
18 audience as you set out to do, whether or not you have 14:35:49  
19 reached your goals in terms of message repetition. 14:35:55  
20 You could do it -- you could do research to see 14:36:01  
21 whether or not -- you could do primary research to 14:36:05  
22 determine whether or not consumers have received the 14:36:10  
23 message, understand the message, and have determined 14:36:13  
24 that they might take action as a result of hearing the 14:36:15  
25 message. 14:36:19

26           The other way to do it is to actually simply           14:36:20  
 27   measure behavioral change. How many people smoke in           14:36:28  
 28   front of their kids prior to the campaign beginning,           14:36:29

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1   and then using that as a benchmark. Then using           14:36:32  
 2   tracking research to see whether or not a -- people           14:36:36  
 3   are changing their behavior over the course of the           14:36:39  
 4   campaign and to what degree.           14:36:42  
 5       Q. So the two methodologies to measure, then,           14:36:44  
 6   awareness, and to measure behavioral change?           14:36:46  
 7       A. No. In the first instance you'd be measuring           14:36:51  
 8   two factors. One is awareness. The second factor           14:36:55  
 9   that goes with it is motivation, whether or not           14:36:58  
 10   they're inclined to change their behavior. And these           14:37:03  
 11   are broad stroke methodologies. The second is to           14:37:08  
 12   literally, in essence, through a census count heads.           14:37:12  
 13   How many people are behaving. How many people have           14:37:16  
 14   actually changed their behavioral pattern.           14:37:20  
 15       The way the State of California measures the           14:37:22  
 16   statewide tobacco use prevention campaign, my           14:37:30  
 17   understanding of it, is they do both sorts of studies.           14:37:35  
 18   They are measuring advertising awareness, measuring           14:37:39  
 19   motivation, and they're going out and measuring           14:37:43  
 20   prevalence rates, which is literally how many people           14:37:47  
 21   are smoking today and how much -- how many packs of           14:37:50  
 22   cigarettes are being sold compared to the population.           14:37:54  
 23       Q. In developing the media plan, and being           14:37:57  
 24   specific with respect to this one, the 12-month fund           14:38:02  
 25   media plan, did you do an advance assessment of the           14:38:04  
 26   effectiveness of what you're proposing, achieving the           14:38:12  
 27   ultimate objectives, as listed in -- on page 73 of           14:38:15  
 28   Exhibit 845?           14:38:20

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1       A. No, we couldn't do that.           14:38:20  
 2       Q. Why couldn't you?           14:38:22  
 3       A. It would have taken -- it would have -- first           14:38:25  
 4   of all, it would have taken a considerable amount of           14:38:29  
 5   time to prepare and mount a study; and, second, it           14:38:31  
 6   would have taken a considerable amount of money to do           14:38:34  
 7   a study; and, third, that's not the business that my           14:38:37  
 8   company is in, and that's not the business I'm in.           14:38:40  
 9       Q. Would that not be important to know before           14:38:43  
 10   putting forward a plan in which you're proposing           14:38:46  
 11   achieving some -- some specific objectives with           14:38:51  
 12   respect to behavioral change?           14:38:54  
 13       A. Not necessarily. There -- the information in           14:38:57  
 14   this plan lays out the scope of the problem, including           14:39:04  
 15   quantifying the scope of the problem in terms of           14:39:09  
 16   people who do continue to smoke, audiences and           14:39:11  
 17   populations that are inclined to still smoke in the           14:39:16  
 18   presence of other people, particularly in the presence           14:39:20  
 19   of their children. Given that information and given           14:39:21  
 20   knowledge from other campaigns, one can assemble a           14:39:25  
 21   campaign with a reasonable degree of certainty that           14:39:30  
 22   you can affect those populations in the manner to           14:39:33  
 23   which you expect to change them.           14:39:36  
 24       You know, I know of very, very few -- in fact,           14:39:40  
 25   I'm not sure I know of any perfect marketing campaigns           14:39:43  
 26   where every "t" is crossed and every "i" is dotted and           14:39:50  
 27   every piece of information that you'd love to know is           14:39:53  
 28   known. If that was the case, General Motors wouldn't           14:39:57

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1   be able to advertise, Apple Computer couldn't           14:39:58

2 advertise, Philip Morris couldn't advertise. 14:40:03

3 Q. Let me direct you to page 68 of what has been 14:40:05

4 marked as Exhibit 845. And the very last line on page 14:40:10

5 68, it states, "A campaign budget of 106" I believe 14:40:15

6 that means million "is required to accomplish this 14:40:20

7 goal." Do you see that? 14:40:23

8 A. Yes, I sure do. 14:40:25

9 Q. How was it determined that a budget of \$106 14:40:27

10 million was going to be required to accomplish the 14:40:31

11 goals as set out in the 12 fund -- 12-month fund media 14:40:34

12 plan? 14:40:40

13 A. As stated earlier, it's a zero-based budget. 14:40:41

14 If you go to -- on the same page, on this page, 68. 14:40:45

15 Given a campaign goal among the various audiences that 14:40:52

16 have been identified, who it is our belief need to be 14:40:58

17 communicated to at various levels to reach at least 50 14:41:02

18 percent of each of those audiences at least six times 14:41:05

19 over a four-week period, which we believe to be an 14:41:09

20 effective -- constitutes an effective frequency level 14:41:12

21 against that reach over the 12-month period of the 14:41:17

22 campaign, you then go back in and you say, "Here are 14:41:21

23 the various media vehicles we would need on a 14:41:25

24 cumulative basis to achieve that goal." Then we would 14:41:29

25 estimate the cost of purchasing those media vehicles 14:41:35

26 -- of negotiating and purchasing those media vehicles 14:41:40

27 during that period. 14:41:43

28 In -- if you are to -- if you were to refer to 14:41:46

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1 the last 20 or so -- 20 or 30 pages of this document, 14:41:50

2 and you look at the flow charts and the various 14:41:57

3 addendum attached, you will see very specifically that 14:41:59

4 -- using television, for example. If you run a 14:42:05

5 certain amount of television rating points that are 14:42:08

6 required to meet this goal, those rating points will 14:42:13

7 cost a certain amount of money. Add up all those 14:42:17

8 pieces, and you get to \$106 million. Based on January 14:42:20

9 -- based on -- this is based on what we were 14:42:28

10 projecting media costs to be for the year 2000 as of 14:42:37

11 last July. And part of our business is projecting 14:42:37

12 media costs. We're supposed to know how to do that. 14:42:40

13 Q. Let me direct your attention to what was 14:42:47

14 previously marked as Exhibit 843. I think you have it 14:42:49

15 there in front of you. 14:42:53

16 A. Yes, sir. 14:42:57

17 Q. Okay. And specifically to page 637 of that 14:42:58

18 exhibit. Well, actually 638. I'm sorry. 14:43:06

19 A. Okay. 14:43:17

20 Q. Is it true that on July 2nd -- on or about 14:43:19

21 July 2nd, when you were planning assignments at 14:43:21

22 Western Initiative Media with respect to the 12-month 14:43:25

23 fund media plan, you projected that the zero-based 14:43:28

24 cost should not exceed \$100 million? 14:43:34

25 A. Well, you know, it's -- in looking at that 14:43:39

26 sentence, it's a contradiction in terms. Because I'd 14:43:43

27 like the plan to be zero-based, to quote myself, but 14:43:45

28 it probably shouldn't exceed \$100 million a year, 14:43:48

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1 which meant I was putting a budget limitation on it. 14:43:52

2 I was putting a budget limitation on it for 14:43:56

3 two reasons. The first was that I'd been informed by 14:43:58

4 Preston Gates & Ellis, at least my recollection, is 14:44:00

5 that the lawsuit was for -- I think they told me it 14:44:03

6 was for \$300 million. Recognizing that if -- if a 14:44:06

7 judgment was reached that awarded \$300 million, there 14:44:14  
8 was a limit of the amount of money that could be spent 14:44:18  
9 on an advertising campaign for this. My view was that 14:44:21  
10 a minimum of three years would be required for a 14:44:26  
11 campaign like this to have the effect you want it to 14:44:32  
12 have -- to have it take. So on a kind of practical 14:44:35  
13 level, I felt that I had to whack that \$300 million up 14:44:39  
14 into three components. 14:44:43

15 The second factor was that -- second factor 14:44:45  
16 was that \$100 million is a big campaign. And, 14:44:50  
17 realistically, in the State of California I'm not sure 14:44:58  
18 that you could spend much more than \$100 million on a 14:45:02  
19 statewide campaign on this subject. The media is in 14:45:08  
20 no obligation to sell you time, and they will put 14:45:13  
21 restrictions on any given advertiser if they're trying 14:45:15  
22 to chew up too much inventory. So I was somewhat 14:45:18  
23 concerned about that. And I said there's no point to 14:45:21  
24 going much further than this because we'd be defeating 14:45:24  
25 our own purpose. 14:45:28

26 Q. Is it still your understanding today that the 14:45:30  
27 plaintiffs in this action are suing defendants for 14:45:35  
28 \$300 million to recover medical costs associated with 14:45:39

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1 treating people who may have contracted various 14:45:43  
2 tobacco-related illnesses as stated on page 637 of 14:45:45  
3 Exhibit 843? 14:45:49

4 A. I don't know that now. I don't know what -- I 14:45:52  
5 don't know what the -- what the remedy they're asking 14:45:56  
6 for now is. 14:45:58

7 Q. If the remedy is considerably less than the 14:46:00  
8 \$300 plus million, would you adjust your cost figure 14:46:02  
9 as reflected on page 68 of Exhibit 845? 14:46:10

10 A. My preference would be to stay with a 14:46:19  
11 zero-based campaign and run it as long as I could, 14:46:21  
12 because it will have its most profound effect in the 14:46:25  
13 early stages anyway. I would personally like to see 14:46:28  
14 just one time somebody try to do this really right. 14:46:35

15 Q. But my question, sir, is this: That if the 14:46:42  
16 case -- if this suit is now about a lot less than 300 14:46:47  
17 plus million, would the in excess of \$100 million that 14:46:55  
18 would be required to achieve the goals in the 12-month 14:47:01  
19 fund media plan be adjusted? 14:47:06

20 A. There's no point to building a media plan if 14:47:10  
21 there aren't dollars to run it. That -- that -- 14:47:13  
22 they're -- there's just no point to doing that. If 14:47:19  
23 you have to go to a budget-based plan, you construct 14:47:23  
24 the plan somewhat differently. You set your goals 14:47:28  
25 somewhat differently. 14:47:30

26 Q. Let me ask you a general question. When you 14:47:32  
27 were devising the 12-month fund media plan and you 14:47:34  
28 looked at setting a budget of 106 -- roughly \$100 14:47:39

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1 million or so, did you -- did you build in any fluff 14:47:45  
2 so that, in other words, if you were to cut out some 14:47:52  
3 aspects of the costs that are laid out in this 14:47:55  
4 document, it wouldn't affect your being able to 14:47:58  
5 achieve the objectives that are set out in the 14:48:01  
6 document -- in the plan, rather? 14:48:04

7 A. I don't think there's fluff in the plan. The 14:48:06  
8 way media plans are constructed, is you use the 14:48:08  
9 numbers that the -- the budget dollars that you used 14:48:13  
10 to estimate the cost of media are generally higher 14:48:17  
11 than what you might actually be able to negotiate when 14:48:22

12 you go into the market to buy. And we use planning -- 14:48:26  
13 what we call planning costs to develop media plans, 14:48:31  
14 because you have to have some room for negotiation, 14:48:35  
15 and you have to take into account that sometimes media 14:48:37  
16 costs go up, and sometimes, for various reasons, you 14:48:41  
17 can negotiate and get better deals. 14:48:44  
18 If there is any fluff in here, if there is any 14:48:46  
19 fluff at all, and I don't particularly like the term, 14:48:52  
20 the estimates for the cost of media, when we did them 14:48:59  
21 in July of 1999, for January through December of the 14:49:02  
22 year 2000, were probably somewhat -- at least in our 14:49:05  
23 minds at that time somewhat inflated over what we 14:49:09  
24 could actually negotiate them for. My expectation 14:49:13  
25 would have been at that time that we could have 14:49:19  
26 delivered this plan -- if we were doing the buying, 14:49:20  
27 and we have no assurance that we would have been doing 14:49:23  
28 the buying, but if we were doing the buying, we 14:49:26

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1 probably could have delivered the plan for somewhere 14:49:29  
2 between 10 and 15 percent less than this budget. That 14:49:31  
3 would have been our thinking back then. As it 14:49:36  
4 happens, we would have been wrong, because media 14:49:39  
5 costs, as it happens, went up about 40 percent in the 14:49:41  
6 State of California this year due to the dot com's, 14:49:44  
7 who spent like -- like mad people, and the elections, 14:49:48  
8 and some other factors that raised the cost of media 14:49:55  
9 tremendously. 14:49:59  
10 Q. In looking at the flow chart that you 14:50:00  
11 referenced early in a response, if you were to cut 14:50:04  
12 out, for example, some placements, whether it's on TV 14:50:06  
13 or in magazines or radios, would cutting out some of 14:50:11  
14 those placements of ads affect negatively on the -- 14:50:17  
15 your ability to achieve the objectives as stated on 14:50:26  
16 page 73 of Exhibit 845? Do you understand my 14:50:28  
17 question? 14:50:37  
18 A. I understand your question. I want to see 14:50:39  
19 page 73. 14:50:41  
20 Q. Let me rephrase the question. Is it 14:50:45  
21 absolutely necessary -- in looking at the flow charts, 14:50:49  
22 again, that are part of this media plan, is it 14:50:51  
23 absolutely necessary to have every placement, whether 14:50:53  
24 it's TV, magazine, or radio, to achieve the stated 14:50:56  
25 objectives as reflected on page 73 of Exhibit 845? 14:51:01  
26 A. We believe that this plan meets the objectives 14:51:10  
27 as stated. I wouldn't want to -- I didn't -- we 14:51:13  
28 didn't submit a plan that we felt was inflated. We 14:51:18

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1 didn't submit a plan that we felt was under -- would 14:51:21  
2 under-deliver. So my answer would be no, I wouldn't 14:51:24  
3 start subtracting from this, based on the plan -- 14:51:27  
4 based on the parameters that we were given at the time 14:51:32  
5 we created the plan. I wouldn't buy one spot -- I 14:51:34  
6 wouldn't plan to buy one spot more than I needed to 14:51:42  
7 buy for anything. There is, to a degree, risk in 14:51:45  
8 overkill in any advertising campaign. You don't run 14:51:50  
9 more than you need to do to accomplish the objective. 14:51:52  
10 MR. RICHARDSON: We've been going for about an 14:51:55  
11 hour and a half. Why don't we take a break. 14:51:57  
12 THE VIDEOGRAPHER: That's a good chance for me 14:52:00  
13 to change the tape. This concludes Tape 2 in the 14:52:02  
14 videotaped deposition of Bruce Silverman. Off the 14:52:04  
15 record at 2:52 p.m. 14:52:07  
16 (Recess taken.) 15:06:09

17 THE VIDEOGRAPHER: This begins Tape 3 in the 15:06:38  
18 videotaped deposition of Bruce Silverman. On the 15:06:41  
19 record at 3:06 p.m. 15:06:46  
20 BY MR. RICHARDSON: 15:06:49  
21 Q. Mr. Silverman, Western Initiative created this 15:06:49  
22 12-month fund media plan based on information it 15:06:52  
23 received from a number of sources; is that correct? 15:06:57  
24 A. That's correct. 15:06:59  
25 Q. Did anyone at Western Initiative confirm the 15:07:01  
26 source information it received for purposes of putting 15:07:05  
27 together the 12-month fund media plan? 15:07:10  
28 MR. HULBURT: Let me just object; that's vague 15:07:15  
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1 and ambiguous and overbroad, without specifically 15:07:16  
2 referring to which piece of information you're talking 15:07:18  
3 about. I mean, the whole thing is chalk full of nuts 15:07:21  
4 with information. 15:07:24  
5 BY MR. RICHARDSON:  
6 Q. Well, let's take a look, for example, at page 15:07:25  
7 59 of Exhibit 845, the fourth indented paragraph. Do 15:07:29  
8 you see that? It states, "A national survey of over 15:07:45  
9 5,000 homes found that 49 percent of children were 15:07:50  
10 exposed to ETS in the home, which 43 percent of 15:07:52  
11 children in this sample under the age of 11 living in 15:07:56  
12 a home with at least one smoker. A quarter of these 15:07:58  
13 children were exposed before birth." Do you see that? 15:08:01  
14 A. Yes, I do. 15:08:04  
15 Q. Did anyone at Western Initiative confirm the 15:08:05  
16 information as stated in that statement? 15:08:09  
17 A. That statement reference -- is referenced to 15:08:13  
18 the source, which is a document called "Warning 15:08:16  
19 Californians About the Dangers of Environmental 15:08:21  
20 Tobacco Smoke." That was published by the Institute 15:08:24  
21 for Health Promotion and Disease Prevention at USC in 15:08:31  
22 April of 1999. We did not make any effort to confirm 15:08:33  
23 whether or not the information in that report was 15:08:38  
24 correct or not. We took it at face value, recognizing 15:08:42  
25 that that's a pretty good source of information. 15:08:46  
26 Q. Do you know how current that information is? 15:08:48  
27 A. The information -- the source of the 15:08:51  
28 information was April 1999. I would have to go back 15:08:54  
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1 and look at the original document to see what they 15:08:58  
2 cite in terms of dating for that information. I don't 15:09:03  
3 know now. It's certainly information that's gettable. 15:09:08  
4 Q. But you created this 12-month fund media plan, 15:09:11  
5 just so I understand, without having confirmed that 15:09:14  
6 statement; "that statement" being what I just 15:09:19  
7 previously read, nor determining whether the 15:09:22  
8 information was current; is that correct? 15:09:32  
9 A. Are you -- are you asking -- do you believe 15:09:32  
10 that it is our job to go and confirm information 15:09:34  
11 that's reported by USC? 15:09:37  
12 Q. No, I'm not -- I'm not stating my belief. I'm 15:09:40  
13 asking you what you did. And I'll -- 15:09:43  
14 A. We relied on the information as provided by 15:09:45  
15 this particular report published by USC. 15:09:46  
16 Q. Okay. Let me refer you to the following page, 15:09:50  
17 page 60 of Exhibit 845. You see the reference to the 15:09:54  
18 second indented paragraph, "Between" -- that starts, 15:10:06  
19 "Between April 1990 and March 1991 cigarette 15:10:10  
20 consumption decreased by 12.2 percent." Do you see 15:10:14  
21 that? 15:10:18

22 A. Yes. 15:10:18  
23 Q. Do you have any understanding as to whether 15:10:22  
24 there -- well, let me rephrase. In putting together 15:10:24  
25 the 12-month fund media plan, did you have -- use more 15:10:39  
26 current information with respect to cigarette 15:10:43  
27 consumption decreasing sometime after March 1991? 15:10:45  
28 A. Yes, we did. 15:10:54

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1 Q. What information did you use? 15:10:54  
2 A. We used -- we used information that is widely 15:10:55  
3 available off the Websites from the Department of 15:10:59  
4 Health Services, information that was provided to us 15:11:04  
5 by Preston Gates & Ellis in the form of the report 15:11:05  
6 from SC. We used other research that came out of our 15:11:09  
7 research department. This particular paragraph was 15:11:14  
8 used to support only one point, and that was that -- 15:11:18  
9 that an economic -- econometric analysis seemed to 15:11:27  
10 support the validity of -- of a media campaign as a 15:11:32  
11 way of getting tobacco use to go down. It's the only 15:11:39  
12 point of that paragraph, is that advertising is a 15:11:45  
13 valid methodology to achieve the ultimate objective. 15:11:47  
14 So the -- the timing in this particular 15:11:54  
15 paragraph is simply demonstrating that, after the tax 15:11:57  
16 increase, that was the first result of Prop 99 took 15:12:02  
17 its toll on tobacco usage in the state, the continued 15:12:06  
18 -- there were no other factors, other than the media 15:12:11  
19 campaign, that would explain the continued accelerated 15:12:13  
20 decline in tobacco use in the early '90s. So that's 15:12:16  
21 the point of that. 15:12:20  
22 Q. Okay. Let me direct your attention to page 15:12:32  
23 62, again of Exhibit 845. 15:12:34  
24 A. Yes. 15:12:39  
25 Q. The second indented paragraph. Do you see 15:12:41  
26 that? 15:12:51  
27 A. Yes, I do. 15:12:52  
28 Q. It reads, "The tobacco industry doubled its 15:12:53

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1 advertising promotion budget from 3.3 billion in 1988 15:12:55  
2 to 6.0 billion in 1993. Increasingly, these dollars 15:12:58  
3 pay for promotional activities that may have special 15:13:03  
4 appeal to young people, such as sponsoring rock 15:13:04  
5 concerts, sporting events, distributing specialty 15:13:08  
6 items bearing logos, and issuing coupons and 15:13:10  
7 premiums." Is it your understanding that the tobacco 15:13:15  
8 companies continue to engage in such advertising and 15:13:19  
9 promotional activities? 15:13:21  
10 A. My understanding is that under the master 15:13:23  
11 settlement agreement many of those activities have 15:13:25  
12 been curtailed. 15:13:28  
13 Q. How did this information as related, as I read 15:13:30  
14 it, play into your creation of the 12-month fund media 15:13:34  
15 plan? 15:13:38  
16 A. Tobacco has been promoted in the United States 15:13:42  
17 for about 120 years. Without getting into a long 15:13:47  
18 discourse on the history of marketing in America, it's 15:13:54  
19 safe to say that most modern marketing strategies and 15:13:58  
20 tactics derive from tobacco programs. Going back to 15:14:03  
21 the century before last, now that I think about it, 15:14:06  
22 the word brand, which we all use every day, derives 15:14:11  
23 from the brand that was placed on sacks of tobacco 15:14:17  
24 sold by a company called Bull Durham. That's where 15:14:21  
25 the brand -- the word "brand" comes from, as a way to 15:14:26  
26 connote a particular manufacturer. 15:14:29



27 What the tobacco industry has done in the last 15:14:30  
28 year or two is interesting, and making some progress 15:14:34

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1 in my mind. But you can't overturn 120 years of -- of 15:14:40  
2 -- of campaigns and activities and programs overnight. 15:14:51  
3 It's going to take years and years, if not decades. 15:14:56  
4 Because the entire concept behind tobacco marketing 15:15:00  
5 was to make it a normative part of our society, 15:15:04  
6 something you did to demonstrate that you were more 15:15:07  
7 grown up, that you were more sophisticated, et cetera. 15:15:14  
8 There were all those reasons. So, you know, whatever 15:15:18  
9 is happening now plays a role. But you're not going 15:15:23  
10 to undo a century plus worth of marketing activity, 15:15:27  
11 billions and billions of dollars of spending for a 15:15:32  
12 product that is so much a part of the life blood of 15:15:37  
13 our society overnight. Not going to happen. It's not 15:15:40  
14 going to happen by tobacco industry activities, nor is 15:15:43  
15 it going to happen by counter-tobacco activities. 15:15:46  
16 Q. So the purpose for your referencing the 15:15:51  
17 advertising promotional activities and budgets for the 15:15:53  
18 tobacco industry many years past is not to suggest 15:15:57  
19 that this media program has to address that, but to 15:16:01  
20 validate that there's need for the plan because of the 15:16:08  
21 conduct that had been engaged in before? 15:16:12  
22 MR. HULBURT: That misstates his testimony. 15:16:15  
23 MR. RICHARDSON: I'm just trying to 15:16:17  
24 understand. 15:16:18  
25 BY MR. RICHARDSON:  
26 Q. Is that a misstatement? 15:16:18  
27 A. Yes. Yes. What I'm -- what I'm saying is, 15:16:26  
28 it's -- it's not a matter of conduct. This -- this 15:16:26

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1 campaign -- this media plan is designed to help 15:16:28  
2 implement an overall communications plan that over a 15:16:32  
3 period of years would affect significant behavioral 15:16:37  
4 change in our society by a fairly large percentage of 15:16:39  
5 the -- of our society that uses tobacco, smokes 15:16:45  
6 cigarettes, uses tobacco products, in a way that may 15:16:49  
7 harm other people. 15:16:52  
8 Changing that takes time. One of the reasons 15:16:55  
9 it takes time is that there's been a long history of 15:16:59  
10 activity. If anything, in the past decade up until 15:17:05  
11 very recently the tobacco industry was very, very 15:17:10  
12 aggressive at trying to counter counter-tobacco 15:17:14  
13 programs. Wherever there were counter-marketing 15:17:18  
14 programs in place, California, Massachusetts, 15:17:22  
15 Minnesota, Florida, tobacco marketing efforts 15:17:30  
16 increased to meet the counter-marketing programs. And 15:17:33  
17 when I talk about marketing, I'm not talking about 15:17:38  
18 specifically just about advertising. I'm talking 15:17:40  
19 about the wide gamut of marketing materials. 15:17:42  
20 Tobacco's an unusual product. It's a lifestyle 15:17:46  
21 product. 15:17:50  
22 MR. LENDRUM: Move to strike as nonresponsive 15:17:53  
23 after the word "yes." 15:17:55  
24 BY MR. RICHARDSON: 15:18:00  
25 Q. Let me direct you to page 65 of Exhibit 845. 15:18:11  
26 It references bar/nightclubs. And, as I understand 15:18:27  
27 it, it is addressing the merchandising activities of 15:18:30  
28 tobacco companies; is that correct? 15:18:35

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1 A. Yes, I believe so. 15:18:38  
2 Q. It's not your position that tobacco companies 15:18:40

3 continue to engage in the merchandising activity as 15:18:43  
4 reflected under the bullet point "bars/nightclubs" in 15:18:47  
5 California; is that correct? 15:18:52

6 A. You know, I really don't remember when the 15:18:55  
7 bars and nightclubs prohibition went into effect in 15:19:02  
8 California. But, again, this is something that the 15:19:05  
9 tobacco industry has done for many years. Even if 15:19:11  
10 they had ceased doing it in California, they continue 15:19:15  
11 doing it in other states. It is portrayed -- this 15:19:18  
12 sort of -- this sort of stuff is portrayed in movies 15:19:23  
13 and television, which not every television show 15:19:26  
14 purports to take place in California. So there are 15:19:29  
15 many different -- many different vehicles where these 15:19:34  
16 kind of messaging is -- is happening, even when it's 15:19:39  
17 not directly under the control of the tobacco 15:19:43  
18 industry. This is -- this is simply trying to 15:19:46  
19 understand the environment in which this campaign 15:19:50  
20 would have to try to operate. 15:19:53

21 Q. Is there any consideration given to the 15:19:56  
22 creation of this plan as to the activity which the 15:19:58  
23 tobacco companies are permitted, and not permitted, to 15:20:04  
24 engage in as a result of the master settlement 15:20:07  
25 agreement entered into in 1998? 15:20:11

26 A. Not really. Had this plan been created two 15:20:23  
27 years earlier, there may have been a greater reliance, 15:20:32  
28 for example, on out-of-home media, meaning billboards, 15:20:36

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1 kiosks, posters, than there is in this plan. Because 15:20:45  
2 by the time this plan was created, it was clear that 15:20:48  
3 outdoor advertising, in general, was going to go away 15:20:50  
4 from the tobacco industry. So you didn't have to do 15:20:51  
5 quite the same one-to-one counterbalancing the 15:20:54  
6 tobacco industries' efforts. On the other hand, as 15:21:00  
7 I've stated, it's -- it's not related. You're not -- 15:21:04  
8 you can't do a successful campaign based on what the 15:21:11  
9 tobacco industry has just begun to do or not do. You 15:21:14  
10 have to try to contravene marketing efforts that have 15:21:18  
11 gone on for decades. 15:21:26

12 Q. Let me direct your attention to page 67 of 15:21:30  
13 Exhibit 845. 15:21:33

14 A. 67 you said? 15:21:41

15 Q. Yes. What is the source of the data that's 15:21:42  
16 reflected there concerning movies and tobacco industry 15:21:45  
17 product placement overview? 15:21:48

18 A. I believe that all of the information on this 15:21:56  
19 page relates back to a study done by the American Lung 15:21:58  
20 Association, Sacramento Chapter. And although it's 15:22:04  
21 not specifically referenced, I know -- I happen to 15:22:08  
22 know that a similar study was conducted and utilized 15:22:13  
23 in -- in general reading in preparation for this plan 15:22:18  
24 by the University of California at San Francisco under 15:22:22  
25 Prop 99 funding. 15:22:27

26 Q. Do you know if any of the information that's 15:22:29  
27 provided on page 67 is current information? 15:22:30

28 A. Current as of today? No, I don't know. 15:22:36

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1 Q. Do you know what timeframe at all any of this 15:22:40  
2 information was gathered? 15:22:46

3 A. This information was all gathered within the 15:22:47  
4 last four or five years. 15:22:49

5 Q. On page 70 of Exhibit 845 there's reference to 15:22:54  
6 Millward Brown or Lieberman Research Worldwide. Do 15:23:03  
7 you see that? 15:23:07

8 A. Yes. 15:23:07  
9 Q. Do you know who they are? 15:23:07  
10 A. Yes. 15:23:09  
11 Q. Who are they, or what are they? 15:23:09  
12 A. They're -- they're -- they are businesses. 15:23:13  
13 They're companies. They're both in the research 15:23:15  
14 business, and they both are leading independent 15:23:19  
15 companies that conduct attitude and awareness tracking 15:23:24  
16 studies for a broad variety of advertisers. Millward 15:23:27  
17 Brown -- Lieberman Research Worldwide is based in Los 15:23:35  
18 Angeles. Millward Brown, as I recall, is based in New 15:23:37  
19 York. And they're -- they're leading companies that 15:23:42  
20 do -- that do tracking. And Millward Brown also does 15:23:50  
21 econometric modeling based on tracking. 15:23:50  
22 Q. Is it -- is it the plan's suggestion that one 15:23:53  
23 of those entities would be involved for making some 15:23:57  
24 assessment as to whether there's been behavioral 15:23:59  
25 change based on the -- based on implementing the plan? 15:24:04  
26 A. Yes. The concept is -- and actually, as you 15:24:11  
27 can see in the next point -- that funds to pay for 15:24:16  
28 this research were incorporated in the plan. When 15:24:19

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1 you're doing a campaign like this, you -- you think 15:24:25  
2 you know where you're going, at least you better. And 15:24:30  
3 you think you have the right way of getting there. 15:24:32  
4 But you constantly need to be assessing whether or not 15:24:35  
5 you're getting there, how quickly you're getting 15:24:38  
6 there, and whether or not you might be getting off the 15:24:41  
7 track. There's only one way to do that, and that's to 15:24:43  
8 -- that's to conduct studies with your target 15:24:47  
9 audiences to see whether or not you're getting the 15:24:49  
10 effect desired. Generally, from these sort of 15:24:52  
11 studies, which you can do quarterly, you're able to 15:24:56  
12 then refine your plan and make it that much more 15:24:58  
13 effective, or correct deficiencies, if there are any. 15:25:01  
14 Q. You mentioned target audiences. Does page 74 15:25:05  
15 reflect what the target audiences are -- who the 15:25:10  
16 target audiences are for the media plan? 15:25:15  
17 A. The target audiences -- the description of 15:25:23  
18 target audiences begins on page 74 and continues for 15:25:25  
19 quite a number of pages. 15:25:32  
20 Q. Directing your attention to page 75, and the 15:25:42  
21 second indented paragraph, it reads, "60 percent of 15:25:47  
22 California's preschool children living in households 15:25:51  
23 where all adults smoke do not live in smoke-free 15:25:54  
24 households. In California households with preschool 15:25:57  
25 children where some adults smoke, one-third do not 15:26:00  
26 live in a smoke-free household." Is that an accurate 15:26:03  
27 statement as far as you're concerned? 15:26:11  
28 A. Yes. 15:26:15

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1 Q. Do you know if anything -- or do you know of 15:26:16  
2 anything that questions that information? 15:26:20  
3 A. I don't know. 15:26:21  
4 Q. Have you read any other published materials 15:26:23  
5 that would suggest that that -- that that is not the 15:26:26  
6 case? 15:26:28  
7 A. No, I haven't. 15:26:29  
8 Q. Again, directing your information to page 78 15:26:59  
9 -- well -- well, no. Let's direct your attention to 15:27:07  
10 page 7 -- to 80, I'm sorry. There's reference to a 15:27:27  
11 target audience, and that being non-English speaking 15:27:42  
12 adults. Do you see that? 15:27:47

13 A. Yes, sir. 15:27:48  
14 Q. The statement is, in the second indented 15:27:48  
15 paragraph, "This fact directly limits their ability to 15:27:50  
16 understand and be impacted by existing ETS warnings." 15:27:53  
17 Do you see that? 15:27:57  
18 A. Yes. 15:27:57  
19 Q. What is the basis of that statement? 15:27:59  
20 A. In looking at the ETS warnings that were 15:28:04  
21 created under Prop 99, those -- that component of the 15:28:07  
22 campaign that specifically dealt with secondhand 15:28:12  
23 smoke, what you will find is that -- that in the 15:28:15  
24 specific campaigns that were addressed to the Chinese 15:28:19  
25 speaking population, Filipino population, Japanese 15:28:23  
26 speaking population, Korean population, Vietnamese 15:28:27  
27 population, and other non-English speaking 15:28:30  
28 populations, or other multicultural populations where 15:28:33  
143  
1 -- where -- where English was not a primary language, 15:28:40  
2 that a smaller percentage -- a much smaller percentage 15:28:43  
3 of another -- of what is already a very small 15:28:48  
4 percentage of the messaging, dealt specifically with 15:28:49  
5 the issue of secondhand smoke. That goes back to 15:28:52  
6 looking at the Prop 99 campaign over the past ten 15:28:57  
7 years. 15:29:00  
8 Q. Is this something that you looked at, or is 15:29:00  
9 that information that you culled from -- from some 15:29:01  
10 other sources? 15:29:04  
11 A. That's something that I was aware of. First 15:29:07  
12 of all, the -- the references are cited on the page, 15:29:11  
13 but it's also consistent with information that I was 15:29:13  
14 well aware of as project manager on the campaign for 15:29:16  
15 five years, on the Prop 99 campaign for five years. 15:29:19  
16 Q. Looking back at the sections concerning target 15:30:00  
17 audiences, there's a section of the plan which details 15:30:03  
18 the media that's suggested for reaching the target 15:30:28  
19 audience; is that -- is that correct? 15:30:32  
20 A. That's correct. 15:30:34  
21 Q. So if one were to look at the flow charts that 15:30:37  
22 are also a part of this plan, which appear to start at 15:30:41  
23 page 148, one would expect some specific allocation, 15:30:58  
24 if you will, of resources to media that's intended to 15:31:16  
25 target the target audiences, correct? 15:31:25  
26 A. Yes. 15:31:30  
27 Q. When you say on page 74 of Exhibit 845 that 15:31:41  
28 the primary advertising emphasis is with respect to 15:31:48  
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1 children ages 6 through 11, teen ages 12 through 17, 15:31:52  
2 and non-English speaking adults 18 and over, how do 15:31:57  
3 you quantify the primary advertising emphasis? 15:32:01  
4 A. The way -- how did we quantify it, is that 15:32:08  
5 what you're asking? 15:32:16  
6 Q. How do you quantify? You specify a primary 15:32:17  
7 advertising emphasis. What percentage of the emphasis 15:32:21  
8 is then focused on this primary advertising with 15:32:23  
9 respect to children, teenagers and non-English 15:32:28  
10 speaking adults as opposed to the secondary emphasis, 15:32:38  
11 which is directed to adults in general? 15:32:38  
12 A. I'd have to go back and look at -- very 15:32:38  
13 specifically, and read through this to see exactly how 15:32:41  
14 it breaks. My -- I would surmise, though, that it's 15:32:41  
15 probably about a 60/40 break. That's -- that's very 15:32:45  
16 typical primary to secondary in advertising. But, 15:32:48  
17 again, in doing any kind of zero-based campaign, or, 15:32:52

18 in fact, doing any kind of advertising campaign, what 15:32:55  
19 you try to do is identify the target audiences who 15:32:58  
20 need to hear the messages the most, who would benefit 15:33:01  
21 most from hearing the messages, or in the case of 15:33:06  
22 products, most likely to consume the product if they 15:33:08  
23 hear the messages. And you rank them. So this -- we 15:33:11  
24 felt that this was a rank order of importance for the 15:33:14  
25 task at hand. Okay. 15:33:19  
26 Q. What -- 15:33:25  
27 A. Children ages 6 to 11, for example -- 15:33:26  
28 MR. HULBURT: Let him ask you another 15:33:28

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1 question. 15:33:29  
2 THE WITNESS: I'm sorry. 15:33:31  
3 BY MR. RICHARDSON: 15:33:31  
4 Q. If I wanted to -- if I wanted to test that 15:33:33  
5 methodology, how would I go about doing that? In 15:33:35  
6 other words, if I want to determine if 60 percent of 15:33:39  
7 the primary advertising emphasis is with respect to 15:33:41  
8 the target audiences comprising children, teenagers, 15:33:43  
9 and non-English speaking adults, what would I need to 15:33:49  
10 do, in looking at your media flow chart, to -- to make 15:33:53  
11 those mathematical computations? 15:33:56  
12 A. You can't do it by looking at the media flow 15:33:59  
13 chart. The media flow chart simply lays out all the 15:34:04  
14 media that's being used and shows when it's running 15:34:06  
15 and how much it costs. What you have to do is go into 15:34:09  
16 the -- you have to go into -- on the document, on page 15:34:12  
17 160, which starts to list all the target analysis on, 15:34:21  
18 you know, how you get -- how we get to -- how we get 15:34:30  
19 to the budget allocation against various targets. And 15:34:36  
20 it's highly technical media stuff. I -- I -- I have 15:34:39  
21 to confess that I would have to spend -- I suppose I 15:34:45  
22 could teach it to everybody in this room, but it would 15:34:50  
23 take about 17 weeks. That's how long it takes us to 15:34:53  
24 teach our people in their training program. It's a 15:34:56  
25 one hour a week, though. If you can do it, I'll be 15:34:59  
26 happy to do it. 15:35:03  
27 Q. What is it that you're referring to that would 15:35:04  
28 have to be taught? 15:35:05

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1 A. You're basically talking how media plans are 15:35:06  
2 constructed from a technical level. 15:35:08  
3 Q. Uh-huh.  
4 A. How you take the information and then quantify 15:35:11  
5 the information to create budget allocations. So if 15:35:14  
6 you go to page 160, there's -- there's target 15:35:19  
7 analysis, and there are -- and you look at kids. 15:35:22  
8 Okay. There's different analyses used to understand 15:35:26  
9 -- we've already identified that kids are an important 15:35:32  
10 target, because they have been under-delivered with 15:35:35  
11 this kind of messaging. Okay. That's the premise of 15:35:38  
12 it. 15:35:41  
13 Then you look and you say, "Okay, what is it 15:35:42  
14 going to take me to effectively reach kids versus 15:35:45  
15 teens versus adults?" All of these different -- here 15:35:47  
16 are the analyses we use that aren't incorporated into 15:35:54  
17 this plan. You know, I mean, it's just -- it's -- 15:36:00  
18 it's the equivalent of adding machine tape. Do all 15:36:02  
19 these different analysis to get to this, then you do 15:36:06  
20 the next step of that, looking at target media usage. 15:36:09  
21 Where you break it down to kids, what percentage of 15:36:13  
22 kids read magazines or watch television or watch prime 15:36:16

23 time television. So that that's how you construct a 15:36:22  
 24 media plan. Media plans are constructed 15:36:25  
 25 mathematically. They're really quite scientific. 15:36:27  
 26 Q. Let's take a look at your flow charts which 15:36:33  
 27 begin on page 149. 15:36:36  
 28 A. Okay. 15:37:00

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1 Q. If you could just walk me through -- for 15:37:01  
 2 example, let's take the very first listing. It says 15:37:04  
 3 "teen magazines" -- 15:37:07  
 4 A. Correct. 15:37:08  
 5 Q. -- on page 149. "Fast Times." 15:37:08  
 6 A. "Fast Times" is a -- is a title. It's a name 15:37:14  
 7 of a magazine. 15:37:17  
 8 Q. Right. 15:37:17  
 9 A. What the bars indicate is that "Fast Times" -- 15:37:18  
 10 "Fast Times" is a monthly magazine. And we would be 15:37:22  
 11 running five insertions, if you go to the total number 15:37:26  
 12 of insertions, which is on the far right side, over 15:37:31  
 13 this period of time. Okay. Now this period of time 15:37:34  
 14 literally indicates the months that the five 15:37:39  
 15 insertions would be on sale. What you're actually 15:37:42  
 16 seeing is -- that's about eight months, right, nine 15:37:46  
 17 months worth of -- nine months worth of coverage. But 15:37:50  
 18 by buying five insertions, part of that time it'll -- 15:37:53  
 19 it'll appear -- you will -- you will end up with some 15:37:56  
 20 coverage in January, some coverage in February, et 15:38:00  
 21 cetera. 15:38:02  
 22 Q. If I'm correct, then to have those five 15:38:05  
 23 insertions over that nine-month period in "Fast 15:38:08  
 24 Times," you were projecting it would cost \$18,975? 15:38:12  
 25 A. That's correct. 15:38:17  
 26 Q. Now, in terms of thinking about the media plan 15:38:19  
 27 as a whole, if you were not to include "Fast Times," 15:38:22  
 28 insertions in "Fast Times" as a part of this media 15:38:30

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1 plan, would that affect your ability to achieve the 15:38:33  
 2 objectives that we discussed earlier that this plan is 15:38:38  
 3 intended to achieve? 15:38:41  
 4 A. Yes, we think so. 15:38:44  
 5 Q. Why -- why is that? 15:38:46  
 6 A. Because we would be losing certain readers of 15:38:47  
 7 those magazines. We wouldn't have the opportunity to 15:38:51  
 8 communicate with them in the manner in which we want 15:38:53  
 9 to communicate with them. When you buy into 15:38:56  
 10 magazines, you're buying two factors. You're buying 15:38:59  
 11 the composition, the audience composition of the 15:39:02  
 12 magazine. You're also buying into the -- the 15:39:07  
 13 environment, the editorial environment of the 15:39:09  
 14 magazine. 15:39:11  
 15 If you're trying to reach kids whose 15:39:12  
 16 lifestyles and values fit with the editorial content 15:39:16  
 17 of "Fast Times," having properly conceived and 15:39:21  
 18 executed ads about secondhand smoke in that 15:39:26  
 19 environment, you get more bang for the buck from a 15:39:30  
 20 communication standpoint. These magazines are pretty 15:39:36  
 21 carefully selected. They compliment each other. 15:39:40  
 22 Partially they compliment each other because they 15:39:47  
 23 cumulatively keep adding people, but also they 15:39:49  
 24 compliment each other in that a kid who reads "Fast 15:39:53  
 25 Times" might not read "Scholastic," might not read 15:39:56  
 26 "Vibe." The kid who reads "Vibe" might not read the 15:40:00  
 27 other. Or if they do, if they read both, they read 15:40:02

28 them for different reasons. And the fact that they 15:40:06  
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1 would be getting messaging in that would perhaps be 15:40:09  
2 persuasive to them. 15:40:12

3 Q. Who makes the determinations as to which 15:40:14  
4 magazines might be appropriate for inclusion in the 15:40:17  
5 media plan? 15:40:22

6 A. The planning team. 15:40:23

7 Q. And the planning team consist of the people we 15:40:25  
8 went over before? 15:40:27

9 A. We mentioned them earlier. 15:40:28

10 Q. That's you, Tiffany Moon, Robert Holtkamp, 15:40:32  
11 Cole Hartman, and perhaps someone -- individuals from 15:40:37  
12 the research department? 15:40:39

13 A. Tiffany Moon is an administrative assistant. 15:40:41  
14 She doesn't make decisions about media plans. The 15:40:44  
15 research people provide information primarily about 15:40:47  
16 target audiences, and they are a resource. But the 15:40:51  
17 evaluation of the magazines themselves and how they 15:40:56  
18 fit together for the plan is done by the planning 15:41:00  
19 team. The leaders of the planning team were Holtkamp 15:41:03  
20 and Hartman. There were other -- as I mentioned 15:41:06  
21 earlier, there were other -- there were other people 15:41:10  
22 involved. I just don't remember who they are. 15:41:13

23 In the case of magazines, we have a -- a group 15:41:16  
24 that specializes in evaluating magazines, in analyzing 15:41:21  
25 their content, analyzing their readership. And so 15:41:27  
26 they're sort of experts on the subject of magazines 15:41:32  
27 within our company. And we would have relied on them 15:41:35  
28 for this component of the plan, just as we have 15:41:38

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1 experts in network television, experts in local 15:41:41  
2 television, et cetera. So they would have been 15:41:45  
3 involved as well. There's about 35 people in the 15:41:47  
4 magazine department who do this sort of work. 15:41:53

5 Q. Where -- is there a flow chart, similar flow 15:42:01  
6 chart created for placements in -- placement of ads on 15:42:07  
7 television? 15:42:14

8 A. Yes, there is. I'm sure there is. 15:42:17

9 Q. Is that on page -- is that reflected on page 15:42:22  
10 -- the copy isn't great. 15:42:26

11 A. There it is. 15:42:28

12 Q. Is it 15 -- 15:42:29

13 MR. HULBURT: 155. 15:42:31

14 THE WITNESS: 155 is the beginning of it. 15:42:32  
15 Pages 155 -- television is on page 155, cable 15:42:34  
16 television is on 157. 15:42:42

17 BY MR. RICHARDSON:

18 Q. Now -- 15:42:50

19 A. And there's some more referenced on 158. 15:42:51

20 Q. Looking at page 155 of Exhibit 845, how does 15:42:56  
21 one read the information that's presented there? For 15:43:00  
22 example, let's look at "Spot Television Hispanic" in 15:43:05  
23 the Los Angeles market under January 27th, that 15:43:11  
24 column, there's a number that reads 125. 15:43:18

25 A. Uh-huh. 15:43:21

26 Q. What does that mean? 15:43:22

27 A. Okay. Broadcast weeks -- the broadcast 15:43:23  
28 calendar that the advertising industry uses begins on 15:43:26

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1 Mondays. We don't operate -- you know, we don't 15:43:30  
2 operate on a conventional basis. Calendar begins on 15:43:34  
3 Monday. January 27th would have been a Monday. So 15:43:37

4 that would have been the week -- the media week of 15:43:39  
5 January 27th. 15:43:42  
6 MR. HULBURT: Isn't it actually December 27th? 15:43:43  
7 THE WITNESS: Actually, that's December. 15:43:45  
8 Thank you very much. Actually, that's December 27th, 15:43:46  
9 thank you. During that broadcast week what we were 15:43:49  
10 proposing was to run in Los Angeles -- in Los Angeles 15:43:52  
11 Hispanic 125 rating points against the target 15:43:57  
12 audience, or target audiences, that we were using 15:44:05  
13 Hispanic advertising, Spanish language television 15:44:09  
14 advertising to reach. You buy -- most television 15:44:13  
15 advertising is bought on the basis of rating points. 15:44:17  
16 You accumulate rating points -- 15:44:20  
17 BY MR. RICHARDSON:  
18 Q. Uh-huh.  
19 A. -- from the ratings of the individual shows 15:44:22  
20 that you run on. And you -- you seek a certain goal. 15:44:23  
21 If you reach 125 rating points, you're reaching 15:44:29  
22 certain -- reaching frequency goals. And, again, as I 15:44:32  
23 mentioned, it's mathematics that gets you there. 15:44:36  
24 Q. You mentioned "Seinfeld" and "Survivors" 15:44:41  
25 earlier today as -- "Seinfeld," which is no longer on 15:44:49  
26 the air. You mentioned those -- 15:44:49  
27 MR. HULBURT: Syndicated on cable. 15:44:52  
28 MR. RICHARDSON: Well, they are. That's true. 15:44:53  
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1 THE WITNESS: It's syndicated on broadcast, 15:44:54  
2 for the most part. 15:44:56  
3 BY MR. RICHARDSON:  
4 Q. But you mentioned those shows as in terms of 15:44:57  
5 being popular shows where the message might be 15:44:59  
6 conveyed, spots may be bought. Is there anything in 15:45:03  
7 the media plan that indicates which television shows 15:45:06  
8 you would recommend spots being run for purposes of 15:45:13  
9 getting the message out? 15:45:19  
10 A. Yes. If you were to go -- for example, if you 15:45:22  
11 would go to page 166. 15:45:28  
12 Q. Right. 15:45:32  
13 A. You'll see a television program analysis for 15:45:33  
14 teenagers of -- of the programs that reach teenagers, 15:45:35  
15 what percentage of the coverage reaches teens, and how 15:45:42  
16 that indexes against the average program. 15:45:45  
17 Q. How is the index number calculated? 15:45:51  
18 A. Like any other index, an average is 100. The 15:45:55  
19 average show is 100. And what you're looking at is 15:45:58  
20 which deliver more -- more or less than average. 15:46:01  
21 Q. And these shows are picked -- selected based 15:46:10  
22 on rating points? 15:46:13  
23 A. Well, no, it's a couple of factors. What 15:46:16  
24 you're trying to do -- when you're buying local 15:46:20  
25 television, what you do is you try to buy against the 15:46:21  
26 goal. And the goal is to reach 125 target rating 15:46:25  
27 points each week in this particular case. Forget the 15:46:29  
28 Hispanic part for a moment. Let's just imagine that 15:46:33  
153  
1 we were after general market teenagers. And the tar 15:46:36  
2 -- and that was how you define the target audience. 15:46:40  
3 You would want to reach -- you would want to be able 15:46:44  
4 to buy 125 target rating points. Now that's simply a 15:46:45  
5 matter of audience delivery. 15:46:51  
6 So what also matters is being in programming 15:46:53  
7 that might be somewhat higher rated against your 15:46:56  
8 target audience rather than lower rated. I could buy 15:46:59



9 a show and get -- if the show is rated a 3, and only 15:47:02  
10 one half of 1 percent of that target audience -- of 15:47:07  
11 the audience of that show is my target audience, I can 15:47:12  
12 say that that one half of 1 percent is 1-1/2 of one 15:47:17  
13 target rating point. It's not a very effective way to 15:47:20  
14 spend the client's money. 15:47:23  
15 Audience -- the type of show that kids are 15:47:26  
16 involved in, or anybody is involved in, counts also. 15:47:29  
17 The more involved you are in the program, the more 15:47:32  
18 likely you are to be involved in the advertising 15:47:35  
19 within that program. And, you know, there is no way 15:47:38  
20 in this country to measure the rating of the 15:47:41  
21 commercials within the show. We can only get a show 15:47:44  
22 rating. We don't get minute-by-minute ratings. Let's 15:47:47  
23 say that when the commercials come on, the rating is 15:47:51  
24 such and such. Wish we could get it, you can get it 15:47:54  
25 in other countries. 15:47:56  
26 So one of the things that we always try to do 15:47:58  
27 is to try to buy into programming that we know our 15:48:00  
28 target audience has an affinity for. That's why you 15:48:04

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1 do the analysis. So it's a combination of buying the 15:48:07  
2 rating points and buying -- and buying the 15:48:11  
3 programming. You buy -- that's the way you buy local 15:48:12  
4 programming. You buy network programming somewhat 15:48:18  
5 differently. You buy cable somewhat differently. 15:48:20  
6 Q. Let's take a look again at page 166 of Exhibit 15:48:23  
7 845. 15:48:27  
8 A. 166? 15:48:31  
9 Q. Yes. If you were not to place ads, for 15:48:32  
10 example, on the show -- there's a listing for a show 15:48:40  
11 "Unhappily Ever After," do you see that, at the very 15:48:43  
12 bottom right-hand side, the second one from the 15:48:47  
13 bottom? 15:48:49  
14 A. Uh-huh. 15:48:50  
15 Q. If you were not to have a placement on that 15:48:50  
16 show, how would that affect your -- the plan's ability 15:48:54  
17 to achieve the stated objectives as outlined on page 15:49:02  
18 73? 15:49:05  
19 A. I think you're -- you're mixing things. We're 15:49:07  
20 not advocating buying all of these shows. This is 15:49:09  
21 simply an exhibit to demonstrate which shows we would 15:49:13  
22 be more likely to buy to deliver on the rating 15:49:17  
23 points -- 15:49:19  
24 Q. Right.  
25 A. -- outlined in the plan. Looking at this 15:49:19  
26 page, we would be likely -- we are more likely to not 15:49:22  
27 buy "Unhappily Ever After," okay, because the coverage 15:49:27  
28 is only 12 percent. 15:49:30

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1 Q. 12 percent, right. 15:49:32  
2 A. So if we bought it, we would be -- we would be 15:49:33  
3 creating a situation where the plan wouldn't work as 15:49:40  
4 well as it might if we were to buy "The Simpsons." 15:49:42  
5 Q. Okay. Let's look at "The Simpsons." If 15:49:47  
6 you're not to buy "The Simpsons," would that affect 15:49:51  
7 the plan's ability to achieve its stated objectives as 15:49:59  
8 reflected on page 73? 15:50:04  
9 A. As long as I bought something equivalent. If 15:50:06  
10 I didn't buy "The Simpsons," buy "Home Improvement." 15:50:09  
11 If I don't buy "Home Improvement," I could buy another 15:50:13  
12 program, or two programs, that could add up to it. 15:50:17  
13 The issue is not so much -- the issue here on this 15:50:20

14 page is selecting programs that the target audience 15:50:23  
15 have a high affinity for. The other map is how many 15:50:28  
16 points you need to achieve your objective. 15:50:38  
17 Q. When you say "the other" -- I'm sorry. 15:50:40  
18 A. You know what, if I was to make a pretty 15:50:41  
19 simple analogy, if I want to drive from here to Los 15:50:43  
20 Angeles, okay, I know that I need to take either the 15:50:49  
21 405 or the 5 once I got past the -- past Irvine. 15:50:53  
22 Q. Uh-huh.  
23 A. I could take either road. One road might take 15:51:01  
24 a little more time. One road might take a little less 15:51:05  
25 time. The other variable is how hard I step on the 15:51:08  
26 gas. The third variable is how empty the roads are. 15:51:10  
27 There are some things I have to do. I have to take 15:51:13  
28 one of those two roads, okay. Or I have to fly; 15:51:17

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1 that's the other variable. And that's like saying, 15:51:20  
2 "Well, I'll use radio instead of television." I can 15:51:22  
3 achieve my objectives any number of ways. It's 15:51:25  
4 putting the most optimal combination together that you 15:51:28  
5 can that defines a very good media plan. 15:51:33  
6 Q. At the beginning of your response you referred 15:51:39  
7 to "the other map." What were you referring to, do 15:51:42  
8 you have a recollection? 15:51:46  
9 A. No. 15:51:47  
10 Q. Okay. 15:51:48  
11 MR. HULBURT: I think he was referring to page 15:51:48  
12 155. Just to put it in context, he was talking about 15:51:51  
13 schedules that has the points, the rating points. 15:51:54  
14 MR. RICHARDSON: I think that's right. 15:51:58  
15 (Exhibit 846 was marked for identification.) 15:52:54  
16 BY MR. RICHARDSON: 15:52:54  
17 Q. Let me hand you -- let me hand you what I'll 15:53:41  
18 have marked as Exhibit 846. Mr. Silverman, if you 15:55:15  
19 were to review that, let me know when you're done, and 15:55:51  
20 my initial question is if you recognize that document. 15:55:56  
21 A. Yes, I do recognize this document. 15:55:59  
22 Q. What do you recognize Exhibit 846 as being? 15:56:00  
23 A. This is a letter from Cole Hartman, who is a 15:56:05  
24 member of the planning team, to Roger Carrick, who's 15:56:08  
25 an attorney at Preston Gates & Ellis, at which -- 15:56:11  
26 where a cost -- media cost comparison was made between 15:56:17  
27 the cost of media in California and the cost of media 15:56:20  
28 in Florida. And as the first paragraph states, the 15:56:26

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1 proposed media plan, this proposed media plan for 15:56:32  
2 California, was proposing about twice as much money as 15:56:36  
3 was spent in Florida in the first year of their 15:56:41  
4 tobacco use prevention campaign that was funded by the 15:56:47  
5 settlement that was made with Florida previous to the 15:56:50  
6 -- prior to the master settlement agreement. 15:56:54  
7 Q. Were you involved in putting together plans 15:56:56  
8 for the Florida campaign? 15:57:00  
9 A. Only on a consulting basis, pro bono 15:57:01  
10 consulting basis. 15:57:06  
11 Q. Okay. What exactly was your involvement? 15:57:07  
12 A. I met with -- I was asked to meet with the 15:57:12  
13 people who were managing the campaign for Governor 15:57:15  
14 Childes, and actually met over the phone. They picked 15:57:19  
15 my brain. That's the best way I can describe it. 15:57:22  
16 Q. When did that take place? 15:57:28  
17 A. Boy, I don't really -- I don't recall what 15:57:31  
18 year that campaign broke. But it was in the year 15:57:35

19 prior to that campaign beginning, whenever that was. 15:57:39  
20 It might have been -- let's see, I started working at 15:57:45  
21 Western in '97. It might have been in 1998. 15:57:51  
22 Q. What exactly was the -- or is the Florida 15:57:54  
23 campaign? How does it compare to the 12-month fund 15:57:58  
24 media plan that you've developed, putting aside the -- 15:58:03  
25 the costs comparison that's being discussed in Exhibit 15:58:06  
26 846? 15:58:10  
27 A. The Florida campaign is the -- the Florida 15:58:12  
28 campaign is -- the Florida is -- Florida's tobacco use 15:58:18

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1 prevention effort that is similar to the Prop 99 15:58:22  
2 funded California tobacco use prevention campaign. It 15:58:27  
3 was funded by a settlement that the state reached with 15:58:33  
4 the tobacco industry prior to the master settlement 15:58:37  
5 agreement. It's my understanding that it resulted in 15:58:40  
6 a one-time budget of around \$50 million. And the -- 15:58:46  
7 that's what I know. 15:58:58  
8 Q. Have you attempted to pattern in any way the 15:58:58  
9 12-month fund media plan after the plan that was 15:59:01  
10 utilized in Florida? 15:59:06  
11 A. No. 15:59:08  
12 Q. Did the plan as utilized in Florida -- was it 15:59:13  
13 designed to affect behavioral changes among Florida 15:59:16  
14 citizens, as you stated the 12-month fund media plan 15:59:22  
15 is designed to do? 15:59:28  
16 MR. HULBURT: Behavioral changes for what? 15:59:31  
17 MR. RICHARDSON: In terms of smoking -- in 15:59:33  
18 terms of tobacco consumption use prevention. 15:59:35  
19 MR. HULBURT: Well, then, I'm going to object 15:59:40  
20 to your question because it misstates his testimony 15:59:41  
21 regarding the purpose of the 12-month media plan in 15:59:43  
22 this case -- 15:59:46  
23 BY MR. RICHARDSON:  
24 Q. Do you --  
25 MR. HULBURT: -- which is not about 15:59:47  
26 consumption of tobacco. 15:59:48  
27 BY MR. RICHARDSON:  
28 Q. Well, do you have an understanding of my 15:59:50

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1 question, Mr. Silverman? 15:59:52  
2 A. I think I understand your question. 15:59:54  
3 Q. Can you answer it? Well, no, why -- why don't 15:59:56  
4 you let me rephrase it. Do you have an understanding 16:00:01  
5 of whether the plan in Florida was designed to affect 16:00:14  
6 behavioral changes with respect to tobacco prevention? 16:00:26  
7 A. It's my belief that that's what was the -- 16:00:28  
8 that was the intention of their campaign. I don't 16:00:31  
9 believe I've ever actually seen their specific plan. 16:00:36  
10 Q. Other than consulting on a pro bono basis -- 16:00:53  
11 well, what was the extent of your consultation with 16:00:57  
12 Florida with respect to their campaign? 16:01:01  
13 A. I had a few conversations with the director -- 16:01:04  
14 excuse me -- with the campaign director. He was 16:01:08  
15 asking about my experiences -- or not really my 16:01:13  
16 personal experience, but rather the experiences in 16:01:17  
17 California with various strategies. 16:01:19  
18 Q. And did I understand that you said what they 16:01:25  
19 were looking to implement was consistent with what was 16:01:28  
20 done in California with respect to Proposition 19 -- 16:01:30  
21 99? 16:01:32  
22 A. No. What I said was that it was sort of their 16:01:35  
23 version of it. That's my language. 16:01:37

24 Q. Are you still in touch with anyone in Florida 16:01:45  
 25 concerning their campaign, their tobacco prevention 16:01:50  
 26 use campaign? 16:01:52  
 27 A. No. 16:01:54  
 28 MR. RICHARDSON: How long have we been going? 16:03:14  
 160  
 1 THE REPORTER: An hour. 16:03:16  
 2 MS. SHERIDAN: Okay.  
 3 MR. RICHARDSON: This is a good time to take a 16:03:18  
 4 break. I'm going to move into a different area. 16:03:19  
 5 MS. SHERIDAN: Okay.  
 6 MR. RICHARDSON: May we? 16:03:22  
 7 MS. SHERIDAN: Sure.  
 8 MR. RICHARDSON: Thanks.  
 9 THE VIDEOGRAPHER: Off the record at 4:03 p.m. 16:03:23  
 10 (Recess taken.) 16:30:34  
 11 THE VIDEOGRAPHER: We're back on the record at 16:30:43  
 12 4:30 p.m. 16:30:45  
 13 BY MR. RICHARDSON:  
 14 Q. Mr. Silverman, let me direct your attention to 16:30:46  
 15 what has been marked as Exhibit 843. I believe it's 16:30:51  
 16 before you. And I want to direct you to the 16:30:54  
 17 second-to-the-last full paragraph on page 636. When 16:31:03  
 18 you've read it, would you let me know. 16:31:17  
 19 A. Are you speaking of the paragraph that begins 16:31:20  
 20 "how much money" -- 16:31:22  
 21 Q. No.  
 22 A. -- or of the paragraph "as you know"? 16:31:23  
 23 Q. "As you know." 16:31:26  
 24 A. Okay. Okay. 16:31:27  
 25 Q. Okay. After you received this letter from Mr. 16:31:35  
 26 McGuire, did you talk to him about what his -- he 16:31:40  
 27 stated in the paragraph you just read? 16:31:45  
 28 A. No. 16:31:49  
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 1 Q. Now, he mentioned a previous discussion that 16:31:53  
 2 you had. In fact, he says, "This will memorialize our 16:31:56  
 3 previous discussions that the media campaign has as an 16:32:00  
 4 additional objective not only making people aware of 16:32:05  
 5 the dangers of ETS, but also to motivate those who 16:32:09  
 6 smoke to do so outside the home, and to motivate 16:32:12  
 7 nonsmokers to request, or demand, compliance with a 16:32:15  
 8 smoke-free home policy." Do you see that? 16:32:16  
 9 A. Yes. 16:32:22  
 10 Q. Do you recall a previous discussion sometime 16:32:22  
 11 before July 25th with Mr. McGuire with respect to that 16:32:23  
 12 matter? 16:32:26  
 13 A. I believe that we discussed that matter on the 16:32:26  
 14 conference call that I previously referenced -- not 16:32:28  
 15 the -- not the -- the conference call -- the second 16:32:32  
 16 conference call. 16:32:35  
 17 Q. Okay. Oh, so the second conference call, 16:32:36  
 18 then, wasn't just about scheduling matters, it was 16:32:39  
 19 substantive in nature? 16:32:42  
 20 A. I guess that this was discussed as well. 16:32:44  
 21 Q. Okay. Does this refresh your recollection as 16:32:46  
 22 to what other matters were discussed in the second 16:32:48  
 23 conference call sometime before July 25th, 2000? 16:32:52  
 24 A. I think we discussed this somewhat. 16:32:59  
 25 Q. Why don't you tell me specifically what was 16:33:03  
 26 discussed with respect to the issue as to the 16:33:06  
 27 additional objective with respect to the media 16:33:09  
 28 campaign. 16:33:13

1 A. Well, I wouldn't -- I wouldn't call it an 16:33:15  
 2 additional objective. What we were talking about was 16:33:18  
 3 that the nature of the assignment from the get-go, as 16:33:21  
 4 evidenced in the media plan itself, was to affect 16:33:26  
 5 behavioral change, not just to make warnings. And I 16:33:30  
 6 understood this to be a semantic thing. For whatever 16:33:38  
 7 reason, he wanted to put it down on paper. But from 16:33:45  
 8 the get-go we always discussed this as affecting 16:33:47  
 9 behavioral change. And in the phone conversation, we 16:33:55  
 10 did discuss that, what it -- what the -- what the 16:33:59  
 11 distinctions were between warnings and, you know, 16:34:02  
 12 getting, you know -- in other words, awareness, and 16:34:04  
 13 that affected behavior. 16:34:07

14 Q. The behavioral change you're referencing is 16:34:09  
 15 behavioral change by whom? 16:34:12

16 A. By consumers. By users of cigarettes, 16:34:14  
 17 smokers. 16:34:18

18 Q. And who are the users primarily? 16:34:19

19 A. Smokers. In this context what we were 16:34:22  
 20 interested in is -- is changing the behavior of people 16:34:26  
 21 who smoke and changing the people of people who don't 16:34:29  
 22 smoke. Meaning, if the world is a perfect place, we 16:34:32  
 23 would hope that smokers would not smoke around other 16:34:38  
 24 people, period. We would also like people who aren't 16:34:40  
 25 smokers to be able to say to people who do smoke near 16:34:45  
 26 them, "Would you mind? We're not -- not trying to be 16:34:48  
 27 Nazis or anything, just would you mind smoking that 16:34:55  
 28 somewhere else?" "Please don't smoke that around me," 16:34:58

1 whatever. We would like children -- am I hearing 16:35:00  
 2 music? Okay. 16:35:04

3 Q. Yeah.

4 A. I thought I was just having something happen 16:35:05  
 5 to me. We would like children, which we find to be an 16:35:07  
 6 effective marketing tactic in these sort of campaigns, 16:35:14  
 7 to say to their -- to -- to really ask their parents 16:35:17  
 8 not to smoke around them in a nice way, respectfully. 16:35:21  
 9 So that's the kind of change we're after. 16:35:25

10 Q. You said as reflected in the media plan 16:35:27  
 11 behavioral -- this notion of behavioral change was 16:35:31  
 12 always a part of what you, at Western Initiative, was 16:35:38  
 13 looking to do. Where in the media plan is that 16:35:41  
 14 expressed? 16:35:44

15 A. Could I have the plan? 16:35:45

16 Q. You have a copy. 16:35:46

17 A. Okay. 16:35:48

18 Q. There you go. Exhibit 845. 16:35:48

19 A. On page 60, "Executive Summary Overview." "An 16:36:05  
 20 impactful media effort, combined with effective 16:36:11  
 21 creative can effect positive behavioral and 16:36:15  
 22 attitudinal change concerning health issues." 16:36:16

23 Q. And in that statement encapsulates what you're 16:36:20  
 24 saying in terms of the -- what Mr., I guess, McGuire 16:36:24  
 25 is stating to be the additional objective of -- 16:36:29

26 THE REPORTER: The what?

27 MR. RICHARDSON: Additional objective of 16:36:34  
 28 making -- I'm sorry -- of motivating those who smoke 16:36:34

1 to do so outside the home, and to motivate 16:36:37  
 2 nonsmokers to request, or demand, compliance with a 16:36:40  
 3 smoke-free home policy; is that correct? 16:36:43

4 THE WITNESS: I don't -- I don't consider it 16:36:47

5 -- there may be language here that says that. I don't 16:36:49  
6 consider it an additional objective. I consider it an 16:36:52  
7 implicit objective. The nature of this assignment 16:36:56  
8 from the beginning was never to post warnings, in 16:37:00  
9 essence. It was a social marketing campaign. By 16:37:05  
10 definition, social marketing campaigns are intended to 16:37:10  
11 change people's behavior. 16:37:13  
12 I think you also have to make the distinction 16:37:17  
13 between a media plan and an advertising plan, or a 16:37:22  
14 marketing plan, which in this situation, to the best 16:37:28  
15 of my knowledge, doesn't exist yet. A media plan has 16:37:32  
16 to do literally with media, how you're going to spend 16:37:38  
17 the money to effectively communicate to get the 16:37:42  
18 desired result. So this -- this plan, this document 16:37:45  
19 called a media plan, doesn't go into depth on 16:37:52  
20 behavioral change because that would be stated in the 16:37:56  
21 advertising objectives, or the marketing objectives in 16:38:00  
22 the documents if those documents existed. Which I -- 16:38:05  
23 I would assume at some point would -- would exist if 16:38:07  
24 there is a campaign going forward. In an effort to 16:38:11  
25 determine what you need in terms of money to do this, 16:38:16  
26 this is a pretty typical thing these days, is to 16:38:19  
27 develop a media plan first to try to get at what 16:38:22  
28 things cost. This happens in the private sector as 16:38:25

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1 well. 16:38:28  
2 So, you know, in this case you probably need 16:38:29  
3 to do something for three to four years, then you 16:38:32  
4 probably got to be prepared to spend about 300 16:38:35  
5 million, \$400 million to do that, at \$100 million a 16:38:39  
6 year roughly. And then to that you also have to add 16:38:44  
7 in the cost of advertising, development production, 16:38:46  
8 and the public relations efforts above that. 16:38:49  
9 BY MR. RICHARDSON:

10 Q. And much of that cost, as I understand it, is 16:38:53  
11 attributable to what you said was the tobacco 16:38:56  
12 company's practices and years of ads concerning 16:38:59  
13 cigarette smoking generally; is that correct? 16:39:10

14 A. I don't think I -- I don't think I said that. 16:39:20  
15 No, I don't think I said that. 16:39:23

16 Q. Okay. What did you say? Well, let me back 16:39:25  
17 up. Do you remember the discussion we had with 16:39:28  
18 respect to your statements that the tobacco industry, 16:39:40  
19 through its practices and years of communications, has 16:39:45  
20 done all it could to dodge the bullet regarding 16:39:49  
21 secondhand smoke? 16:39:51

22 A. Yes, I remember saying that. 16:39:53

23 Q. When you used that expression "dodge the 16:39:54  
24 bullet on secondhand smoke," exactly what do you mean? 16:39:59

25 A. Secondhand smoke is dangerous. Secondhand 16:40:03  
26 smoke kills. Yet, in all of the controversy regarding 16:40:06  
27 tobacco and the health effects of tobacco smoke, or 16:40:18  
28 the deleterious effects of tobacco smoke, up until 16:40:21

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1 very, very recently the tobacco industry kind of held 16:40:26  
2 fast on the position that secondhand smoke was not 16:40:31  
3 something that should be thought of as anything other 16:40:34  
4 than obnoxious. More than that, tobacco advertising 16:40:37  
5 -- tobacco -- all marketing efforts for tobacco make 16:40:45  
6 it something that is done in social situations. It's 16:40:50  
7 part of human relationships, or so the industry would 16:40:57  
8 have liked people to believe over all of these many 16:41:01  
9 years. 16:41:04

10 Well, when -- as soon as it's part of social 16:41:05  
11 interaction, that means you're putting someone who 16:41:09  
12 doesn't smoke, if they happened to be in contact with 16:41:11  
13 a smoker, at risk. If the tobacco industry wanted 16:41:15  
14 very consciously to try to convey that smoking is 16:41:22  
15 better done in a solitary manner, there are ways they 16:41:26  
16 could do that. They could be very overt, or they 16:41:31  
17 could be, you know, a little bit more conscientious in 16:41:35  
18 the way they portray the habit in their advertising. 16:41:39  
19 Q. Mr. Silverman, have you looked specifically at 16:41:50  
20 what the tobacco companies have done with respect to 16:41:52  
21 their ads concerning environmental tobacco smoke since 16:41:58  
22 the past -- since the entry of the MSA in December of 16:42:03  
23 1998? 16:42:08  
24 A. Are you speaking of -- of issues ads, ads 16:42:09  
25 where they specifically are talking about 16:42:16  
26 health-related issues, or are you talking about 16:42:19  
27 general brand advertising? 16:42:21  
28 Q. I'm talking about the whole gamut, general 16:42:22  
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1 brand advertising. 16:42:25  
2 A. I've looked at -- I've looked at recent 16:42:26  
3 tobacco -- I've looked at some samples of recent 16:42:35  
4 tobacco advertising. 16:42:35  
5 Q. Have you focused on those ads that -- let me 16:42:38  
6 back up. Have you focused on any statements tobacco 16:42:42  
7 companies have made with respect to environmental 16:42:45  
8 tobacco smoke? 16:42:48  
9 A. I've read some of their statements that appear 16:42:49  
10 on their Websites. 16:42:51  
11 Q. Have you made any effort in developing your 16:42:52  
12 media plan to focus on what it would take, to your 16:42:54  
13 mind, to correct the positions the tobacco companies 16:42:59  
14 have taken with respect to environmental tobacco smoke 16:43:05  
15 since December of 1998? 16:43:07  
16 A. This media plan was created, as you can see, 16:43:13  
17 in July of 1999. At that point -- I would -- I would 16:43:16  
18 imagine that the tobacco companies at that point were 16:43:23  
19 still in the process of formulating whatever their 16:43:26  
20 positions were going to be. Looking at it today on a 16:43:28  
21 going forward basis, my view is that the positions 16:43:32  
22 that they're taking in their Websites, et cetera, are 16:43:38  
23 virtually immaterial. They can state a feeling, and 16:43:45  
24 it could be something that I agree with, could be 16:43:49  
25 something that I believe that they have absolutely 16:43:52  
26 owned up, except in looking at how they continue to 16:43:54  
27 advertise, which is their most visible communication, 16:44:00  
28 reaching the much larger numbers of people, reaching 16:44:03  
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1 them in a far more impactful manner. I'm not seeing 16:44:07  
2 evidence of trying to be responsible on this issue. 16:44:16  
3 Q. Well, just looking at, as you say, the ads 16:44:21  
4 that the tobacco companies have run with respect to 16:44:24  
5 the environmental tobacco smoke issues since 1998, 16:44:26  
6 have you looked at what media campaigns could be run 16:44:32  
7 to counter those ads as opposed to ads that were -- as 16:44:38  
8 opposed to advertisements that were being run prior to 16:44:46  
9 December of 1998? 16:44:49  
10 MR. HULBURT: I think you have to be more 16:44:50  
11 specific and tell him what ads you're talking about. 16:44:53  
12 I think your question is vague and ambiguous and 16:44:55  
13 overbroad, and it requires him to speculate as to what 16:44:57  
14 ads you're referring to. 16:44:59

15 BY MR. RICHARDSON:  
16 Q. I'm talking --  
17 MR. HULBURT: What tobacco company ads you're 16:45:01  
18 referring to. 16:45:04  
19 BY MR. RICHARDSON:  
20 Q. I'm referring to the ads that you're referring 16:45:04  
21 to, Mr. Silverman, whatever ads you had in mind. 16:45:06  
22 MR. HULBURT: He's referring to the ads that 16:45:09  
23 are in his file that have been produced to you. So -- 16:45:12  
24 and I don't think you'll find in there any ads where a 16:45:16  
25 tobacco company is overtly discussing environmental 16:45:20  
26 tobacco smoke. So that's, I think -- that's part of 16:45:24  
27 my confusion in your question. 16:45:28  
28 ///

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1 BY MR. RICHARDSON:  
2 Q. Is that a correct statement of your -- 16:45:37  
3 A. Yes. 16:45:39  
4 Q. -- understanding? 16:45:39  
5 A. It is. 16:45:40  
6 Q. Okay. Okay. Mr. Silverman, have you made any 16:45:40  
7 analysis of what an effective media plan would need to 16:46:32  
8 be put in place to address tobacco company conduct of 16:46:41  
9 any kind after December of 1998? 16:46:46  
10 MR. HULBURT: I'm going to object; that's 16:46:52  
11 vague and ambiguous, calls for speculation. 16:46:54  
12 BY MR. RICHARDSON:  
13 Q. You can answer. 16:46:57  
14 MR. HULBURT: If you understand what he's 16:47:01  
15 asking about. 16:47:02  
16 THE WITNESS: I'm -- I'm not sure I understand 16:47:03  
17 what you're asking. 16:47:04  
18 BY MR. RICHARDSON: 16:47:10  
19 Q. As I understand your 12-month fund media plan, 16:47:17  
20 it's directed, as you say -- well, let's look at what 16:47:20  
21 it says. Your 12-month media plan is designed to 16:47:25  
22 address, as I understand your statements today, the 16:47:59  
23 tobacco industry having dodged the bullet on 16:48:04  
24 secondhand smoke over a period of years. That's in 16:48:08  
25 part what it's designed to do; is that correct? 16:48:10  
26 MR. HULBURT: Let me -- let me object; that 16:48:15  
27 misstates his testimony. That was one of the four 16:48:16  
28 opinions that he said he had. And Number 4 of the 16:48:19

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1 four opinions was this plan would educate the public, 16:48:24  
2 and motivate change in behavior. 16:48:27  
3 MR. RICHARDSON: I understand that, Chris, and 16:48:30  
4 that's why I prefaced -- that's why I qualified the 16:48:31  
5 question by saying "in part." I wasn't suggesting 16:48:34  
6 that that's the entirety of his opinion. BY MR. 16:48:39  
7 RICHARDSON:  
8 Q. Now, let me rephrase this. One of your 16:48:41  
9 opinions is that the 12-month media plan would address 16:48:46  
10 the tobacco industry's practices over the years with 16:49:01  
11 -- and the kind of communications the tobacco industry 16:49:09  
12 has put out, which has allowed it to dodge the bullet 16:49:12  
13 on secondhand smoke; is that correct? 16:49:16  
14 A. You know, you asked the question initially 16:49:25  
15 about what opinions I had, and I gave you some 16:49:27  
16 opinions. 16:49:30  
17 Q. Yes. 16:49:31  
18 A. The purpose of the media plan is to meet a 16:49:32  
19 certain goal, and the goal is to affect behavioral 16:49:37



20 change regarding secondhand smoke by people who smoke 16:49:41  
21 or people who are in contact with smokers in the state 16:49:44  
22 of California. The tobacco industry over many, many, 16:49:47  
23 many, many years has created an environment, has -- 16:49:51  
24 has very effectively used marketing techniques to 16:49:57  
25 create an environment in which smoking was a normative 16:50:00  
26 -- normative social practice. It is more -- it is 16:50:03  
27 more of a normative social practice in certain 16:50:08  
28 audiences than others. 16:50:12

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1 This media plan, as part of an overall social 16:50:14  
2 marketing campaign, is designed to address that -- 16:50:20  
3 address that problem, counter the effects of the 16:50:25  
4 tobacco company's marketing programs, in creating that 16:50:30  
5 normative environment to affect behavioral change so 16:50:35  
6 that people won't smoke around other people. 16:50:39

7 Q. Have you looked at the tobacco company's 16:50:53  
8 marketing programs after -- in place after December of 16:50:53  
9 1998, and looked at developing a media plan that would 16:50:59  
10 counter those marketing programs? 16:51:07

11 A. You're asking if we have developed -- if we 16:51:12  
12 have looked at developing a media plan to counter 16:51:15  
13 tobacco marketing programs that have been implemented 16:51:18  
14 since -- 16:51:21

15 Q. December of 1998. 16:51:23

16 A. December of 1998. No, we have not been asked 16:51:24  
17 to do that, nor have we done it. 16:51:26

18 Q. Is that something that you could do? 16:51:28

19 A. I suppose you can do anything. I'm not sure 16:51:37  
20 what you would gain by doing that. The -- if you're 16:51:39  
21 trying to affect social change, an arbitrary point of 16:51:50  
22 December of 1998 is immaterial in that kind of -- for 16:51:59  
23 that kind of an assignment. It's just -- it's just an 16:52:06  
24 arbitrary point in time that is not relevant from a 16:52:15  
25 consumer standpoint, from a societal standpoint. 16:52:18

26 Q. You said that you suppose it could be done. 16:52:31  
27 How would you go about doing that? 16:52:39

28 A. Well, the way you phrased it -- the way you 16:52:45

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1 phrased the question, Tony, if I recall, you were 16:52:49  
2 saying create a plan to counter what the tobacco 16:52:52  
3 industry has done. Is that correct? 16:52:56

4 Q. With respect to its marketing programs, yes. 16:53:03

5 A. Well, the first thing I would have to do is 16:53:08  
6 try to isolate what the tobacco industry has been 16:53:11  
7 doing differently since 1998, and to determine -- 16:53:15  
8 determine what, if anything, needs to be countered 16:53:22  
9 very specifically. This -- this plan, this countering 16:53:26  
10 is countering society, and it's countering certain 16:53:39  
11 practices in our society that are deemed acceptable. 16:53:45  
12 In my view they're deemed acceptable because the 16:53:49  
13 public has been partially trained to deem them 16:53:51  
14 acceptable. So I'm -- I really don't know how to 16:53:53  
15 respond well to the question you're asking because 16:54:00  
16 it's -- it's so hypothetical that it's bordering on -- 16:54:02  
17 bordering on something that -- I'm not sure anything 16:54:08  
18 could be done. I wouldn't know how to do it. 16:54:11

19 Q. Is a basic premise of the 12-month fund media 16:54:13  
20 plan that there's been an increase in, for example, 16:54:18  
21 youth smoking in California? 16:54:25

22 A. I don't think that's the premise of the plan, 16:54:29  
23 no. Although it is my understanding there has been 16:54:31  
24 increase in youth smoking. 16:54:33

25 (Exhibit 847 was marked for identification.)  
26 BY MR. RICHARDSON:  
27 Q. Let me hand you what's going to be marked as 16:54:36  
28 Exhibit 847, and ask you to take a few minutes, sir, 16:54:49  
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1 read it over. And when you're done, would you let me 16:54:58  
2 know. Are you done, sir? 16:55:00  
3 A. I'm ready -- 16:56:08  
4 Q. Okay.  
5 A. -- whenever you're ready. 16:56:10  
6 Q. You notice in the first paragraph there's 16:56:14  
7 reference to Governor Gray Davis and making an 16:56:17  
8 announcement concerning the preventative efforts from 16:56:21  
9 the state, and those efforts leading to a dramatic 16:56:24  
10 decrease in youth smoking in California last year. Do 16:56:32  
11 you -- do you have an understanding that that's a 16:56:33  
12 correct statement? 16:56:35  
13 A. I guess that's a correct statement. 16:56:40  
14 Q. It references that there was an annual survey 16:56:40  
15 conducted by the California Department of Health 16:56:42  
16 Services. Do you see that? 16:56:45  
17 A. Yes, I -- I just read it. 16:56:45  
18 Q. Are you familiar with an annual survey 16:56:46  
19 conducted by the Department of Health Services 16:56:48  
20 relating to smoking prevalence among California youth? 16:56:51  
21 A. I'm aware of a survey, yes. 16:56:56  
22 Q. Did you review that survey at any point in 16:56:59  
23 time for purposes of your expert work in this case? 16:57:03  
24 A. I don't believe I read the results of the 16:57:09  
25 survey that are being -- the specific survey results 16:57:12  
26 that are being referenced in this press release. 16:57:15  
27 Q. Okay. There's also reference in the second 16:57:19  
28 paragraph to the state's aggressive anti-tobacco 16:57:21  
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1 efforts, having set the pace for other states in the 16:57:25  
2 -- in the crusade to combat smoking. Do you see that? 16:57:28  
3 A. Yes. 16:57:31  
4 Q. Is that an -- is that a statement you agree 16:57:31  
5 with? 16:57:35  
6 A. Yes, I do. 16:57:36  
7 Q. There's also reference in the third paragraph 16:57:43  
8 to California, the state having spent more than a 16:57:45  
9 billion dollars on tobacco education. Do you see 16:57:51  
10 that? 16:57:57  
11 A. Uh-huh. 16:57:57  
12 Q. Do you have an understanding of that being a 16:57:58  
13 correct statement? 16:57:59  
14 A. I don't know if that's a correct statement. 16:58:02  
15 Governor said it. 16:58:05  
16 Q. Do you have any reason to doubt its veracity 16:58:06  
17 or validity? 16:58:09  
18 A. I don't know what they're counting to get to a 16:58:11  
19 billion dollars. I know that in the past ten years 16:58:17  
20 they haven't spent a -- they have not come anywhere 16:58:25  
21 close to spending a billion dollars on the tobacco 16:58:28  
22 education media campaign, which I'm familiar with. 16:58:32  
23 Q. Looking at the fourth paragraph, there's a 16:59:01  
24 discussion about smoking prevalence among the -- among 16:59:04  
25 youth. Do you see that? 16:59:06  
26 A. Uh-huh. 16:59:08  
27 Q. Is there anything in that paragraph that you 16:59:08  
28 disagree with? 16:59:11  
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1 A. You know, I don't want to disbelieve our 16:59:25  
2 governor. I would love to see the report on which 16:59:29  
3 this is based, the specific report on which this is 16:59:34  
4 based. The numbers surprise me somewhat. But if that 16:59:38  
5 happened, that's good; isn't it? 16:59:41  
6 Q. Absolutely. 16:59:43  
7 MS. SHERIDAN: Just for the record, just so 16:59:46  
8 that we're clear, the document you've been given 16:59:54  
9 identifies the report as not being one from the 16:59:54  
10 governor, but one from the California Department of 16:59:54  
11 Health Services.  
12 THE WITNESS: Yeah, I understand that. 16:59:58  
13 BY MR. RICHARDSON:  
14 Q. And I should also add, it's -- it's a document 16:59:58  
15 -- it's a two-page document, appears to be a printout 17:00:01  
16 from the Website. It's entitled at the very top, 17:00:04  
17 "Yahoo - Governor Proud to Announce California Teen 17:00:11  
18 Smoking Rate Plummeted." 17:00:15  
19 Let me direct your attention to the fifth 17:00:17  
20 paragraph. It reads, and it's in quotes, 17:00:21  
21 "'California's young people have grown up in the 17:00:24  
22 Proposition 99 era,' said Governor Davis. 'The 17:00:27  
23 advertising campaigns and community-based programs to 17:00:30  
24 combat tobacco and the nonsmoking policies in 17:00:34  
25 California restaurants, stores and schools have 17:00:36  
26 dramatically shifted Californians' attitudes and 17:00:40  
27 behavior toward tobacco use.'" do you see that? 17:00:42  
28 A. Yes. 17:00:45

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1 Q. Do you agree with that statement -- those 17:00:46  
2 statements? 17:00:47  
3 A. Yes. 17:00:50  
4 Q. You agree that the advertising campaigns have 17:00:54  
5 shifted Californians' attitudes and behavior toward 17:00:59  
6 tobacco use? 17:01:02  
7 A. I think the advertising campaigns have 17:01:04  
8 contributed to shifting attitudes and behavior. 17:01:06  
9 Q. Is it your position that the shifting of 17:01:15  
10 behavior has not been enough, and that's why the 17:01:17  
11 12-month fund media plan that you're proposing is 17:01:21  
12 necessary? 17:01:25  
13 MR. HULBURT: What behavior are you asking him 17:01:27  
14 about? I object; the question is vague and ambiguous, 17:01:28  
15 calls for speculation as to what behavior you're 17:01:33  
16 inquiring. This -- this paragraph is talking about 17:01:39  
17 the incidence of people smoking. The media plan has 17:01:44  
18 nothing to do with that. 17:01:49  
19 BY MR. RICHARDSON:  
20 Q. Is that your understanding? 17:01:50  
21 A. Yes. 17:01:52  
22 Q. Is that your reading? 17:01:52  
23 A. That would have been -- my answer would have 17:01:52  
24 been very similar. 17:01:54  
25 Q. And the media plan -- the behavior that the 17:01:54  
26 media plan is intending to shift is what? 17:01:57  
27 MR. MILES: His answer would have been similar 17:02:03  
28 to your objection. I can't imagine. 17:02:04

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1 MR. HULBURT: I'm learning. 17:02:07  
2 THE WITNESS: The purpose of the media plan is 17:02:12  
3 to change behavior by people who smoke and by people 17:02:15  
4 who are in contact with people who smoke. 17:02:18  
5 BY MR. RICHARDSON:

6 Q. Would not changing one's behavior with respect 17:02:25  
7 to smoking necessarily change behavior with respect to 17:02:28  
8 those who are exposed to smoke? 17:02:32  
9 A. I'm sorry. Could you rephrase, or restate the 17:02:38  
10 question? 17:02:40  
11 Q. Okay. Isn't changing one's behavior with 17:02:48  
12 respect to tobacco use necessarily impacting on 17:02:50  
13 changed behavior with those who are exposed to that 17:02:57  
14 smoke? 17:02:59  
15 MR. HULBURT: Same objection; as vague and 17:03:01  
16 ambiguous. As to what behavior are you talking about 17:03:02  
17 being changed? You're using the broad phrase. 17:03:05  
18 MR. LENDRUM: Come on, Chris, the speaking 17:03:12  
19 objections are really inappropriate. 17:03:14  
20 MR. HULBURT: But, I mean, it's -- I'm 17:03:15  
21 speaking candidly. Using a broad phrase "behavior 17:03:16  
22 with the use of tobacco" -- 17:03:19  
23 MR. RICHARDSON: Jeff, the record will 17:03:20  
24 reflect, so -- 17:03:22  
25 MR. HULBURT: -- which, by itself, has no 17:03:23  
26 meaning. Behavior in what way? In how somebody 17:03:24  
27 smokes, whether somebody smokes, where somebody 17:03:28  
28 smokes? I'm not -- I'm genuinely not trying to be in 17:03:30  
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1 the way, but I think your question gives him no 17:03:34  
2 guidance as to what it is you're really asking him 17:03:37  
3 about. 17:03:39  
4 MR. RICHARDSON: Let me -- let me try to 17:03:39  
5 rephrase it. 17:03:40  
6 BY MR. RICHARDSON:  
7 Q. And, Mr. Silverman, if you don't understand 17:03:41  
8 it, just tell me. If Californians' smokers' behavior 17:03:44  
9 toward tobacco use has changed, wouldn't that 17:04:01  
10 necessarily impact on the changed behavior you discuss 17:04:09  
11 that is a goal of the 12-month fund media plan? 17:04:18  
12 MR. HULBURT: Same objection. 17:04:25  
13 MR. RICHARDSON: Noted. 17:04:27  
14 THE WITNESS: If -- if the behavior of smokers 17:04:29  
15 has substantially changed in regards to their smoking 17:04:38  
16 practices around other people, if the behavior of 17:04:46  
17 nonsmokers has dramatically changed around people who 17:04:49  
18 do smoke, if the behavior of young people, children, 17:04:54  
19 teenagers, has changed as it affects their 17:05:02  
20 relationship with their parents or guardians who do 17:05:09  
21 smoke, yes, under those circumstances I would say that 17:05:11  
22 possibly some of the stated goals in the media plan 17:05:17  
23 could be changed. 17:05:23  
24 I cannot, from this document, from this press 17:05:26  
25 release, conclude that that's the case, because this 17:05:30  
26 is talking in general about smoking. Based on what I 17:05:35  
27 know of the Prop 99 campaigns, the Prop 99 campaigns, 17:05:40  
28 as we have said repeatedly, are intended to try to get 17:05:47  
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1 people to not begin smoking, and they're intended to 17:05:50  
2 try to get people who are smoking to consider quitting 17:05:55  
3 or to seek help -- seek help quitting. There's -- I 17:05:57  
4 just -- I don't believe that there's any effort in 17:06:04  
5 those campaigns to achieve the same goals that this 17:06:06  
6 particular media plan was written to help reach. 17:06:11  
7 BY MR. RICHARDSON:  
8 Q. An objective of this media plan, the 12-month 17:06:16  
9 fund media plan, is to motivate those who smoke to do 17:06:22  
10 so outside the home, and to motivate nonsmokers to 17:06:27

11 request, or demand, compliance with a smoke-free home 17:06:31  
12 policy; isn't that one of the objectives? 17:06:40  
13 A. Yes, I would say that. 17:06:40  
14 Q. Okay. Let me direct your attention to the 17:06:40  
15 last statement on the first page of Exhibit 847. It 17:06:40  
16 reads, "Also, adult smokers are voluntarily banning 17:06:44  
17 smoking in their homes at rates nearly four times the 17:06:49  
18 national average." Is that a statement you agree 17:06:52  
19 with? 17:06:55  
20 A. I'm not sure if I agree with it, because I 17:06:58  
21 don't know what he means -- what this particular press 17:07:01  
22 release means by adult smokers. I don't know whether 17:07:03  
23 that's an average of all adult smokers, whether that's 17:07:07  
24 the general population. I don't know where it fits in 17:07:10  
25 terms of ethnic populations. Also, I have to confess 17:07:13  
26 that I don't know how this works contextually. The 17:07:19  
27 fact that they are voluntarily banning smoking at four 17:07:26  
28 times the national average may not, on an absolute 17:07:29

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1 basis, still result in something that shouldn't be 17:07:32  
2 worked on aggressively. 17:07:36  
3 Q. Do you know what the national average is? 17:07:39  
4 A. No, I don't. 17:07:40  
5 Q. Okay. Do you know it to be more than 50 17:07:41  
6 percent, for example? 17:07:44  
7 A. I don't know. I'm sorry. 17:07:45  
8 Q. Is there an expectation that if the media plan 17:07:59  
9 is put into place, implemented, that Western 17:08:07  
10 Initiative Media would be appointed to do so? 17:08:14  
11 A. No. I don't think so, no. I -- I have no 17:08:20  
12 idea how this plan, if it was to be implemented, would 17:08:24  
13 be administered. If -- for example, if it was to be 17:08:30  
14 administered via the California Department of Health 17:08:36  
15 Services, the public -- public acquisitions laws would 17:08:43  
16 require a competitive bidding of some sort, which 17:08:48  
17 would put us onto an equal footing with any other 17:08:52  
18 prospective bidder, I suppose. If it's being done by 17:08:56  
19 a private foundation, it would be another apparatus. 17:09:00  
20 If the tobacco industry was itself administering it, 17:09:03  
21 it would be another factor. So, no, I have no idea 17:09:07  
22 whether or not we could win this contract if a 17:09:10  
23 contract came to be. 17:09:12  
24 Q. When you first were retained as an expert in 17:09:14  
25 this case, was it your expectation that Western 17:09:18  
26 Initiative might be appointed by -- might be appointed 17:09:22  
27 for the purposes of administering awards to implement 17:09:26  
28 the campaign? 17:09:30

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1 A. Yes, it was. 17:09:31  
2 Q. You no longer have that expectation? 17:09:32  
3 A. No. 17:09:35  
4 Q. Why not? 17:09:35  
5 A. When -- when this -- when this assignment was 17:09:37  
6 first discussed with me by Preston Gates & Ellis, I 17:09:42  
7 asked very specifically if there was a -- if somehow 17:09:48  
8 or other this came to be, how might it be 17:09:56  
9 administered. And at that time I was told that it was 17:09:59  
10 anticipated that some sort of foundation would be set 17:10:02  
11 up. If it was outside -- if it was outside of 17:10:05  
12 government, it seemed to me that at that point we 17:10:11  
13 would have had a leg up in securing the assignment. 17:10:15  
14 Typically, if you've done the media plan, and 17:10:19  
15 you have a tremendous amount of resident expertise, 17:10:23

16 and you're the largest media agency in the world and 17:10:27  
17 by far the largest media agency in the state of 17:10:31  
18 California, and you buy one out of every four 17:10:35  
19 television spots, and one out of every four radio 17:10:38  
20 spots in the state, generally speaking, I would have 17:10:41  
21 thought that we would have a good shot at the -- and 17:10:43  
22 we don't work for tobacco companies, we would have a 17:10:46  
23 good shot at the assignment. But not knowing how it's 17:10:48  
24 going to turn out, if it's going to turn out, I sort 17:10:53  
25 of over the past year have -- particularly over the 17:10:57  
26 last two months have kind of concluded, well, we'll 17:10:59  
27 see. 17:11:02  
28 Q. At the outset of the deposition I asked you 17:11:06

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1 about preparations you'd undertaken for this 17:11:07  
2 deposition. Do you recall that? 17:11:10  
3 A. It seems a long time ago, sir. Yes. 17:11:13  
4 Q. Yeah, this morning. We talked about your 17:11:16  
5 reviewing documents. You recall that? 17:11:20  
6 A. Yes. 17:11:25  
7 Q. Did you prepare for the deposition in any 17:11:25  
8 other ways other than reviewing documents? Let me 17:11:27  
9 rephrase that. Did you have discussions with counsel 17:11:35  
10 for AESI as a part of your preparations for the 17:11:36  
11 deposition today? 17:11:41  
12 A. Meaning the Thorsnes concern? 17:11:43  
13 Q. Yes. 17:11:46  
14 A. Yes. 17:11:47  
15 Q. Okay. When did you have those discussions? 17:11:47  
16 A. As previously stated, there was the conference 17:11:51  
17 call at which I was -- I was physically present at 17:11:54  
18 Preston Gates & Ellis. There was the conference call, 17:11:59  
19 the second conference call. There -- I met with Chris 17:12:07  
20 last night for an hour to just go through the usual 17:12:23  
21 what you do in deposition stuff. I would basically 17:12:28  
22 say that's it. 17:12:35  
23 Q. Okay. The meeting that you had with Mr. 17:12:37  
24 Hulburt you said was for about an hour last night? 17:12:41  
25 A. I would guess, yeah, it was about an hour. 17:12:47  
26 Q. What did you discuss with respect to preparing 17:12:49  
27 for the deposition today? 17:12:51  
28 A. We discussed, you know, what the -- what the 17:12:55

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1 likely line of questioning might be. I was -- I was 17:12:58  
2 asked to try to keep my answers short and pointed. 17:13:07  
3 Not to ramble on, as is my want. But I did, anyway. 17:13:11  
4 MR. HULBURT: I obviously failed in that. 17:13:19  
5 THE WITNESS: We -- we looked together at some 17:13:26  
6 of the magazine ads. Chris asked, you know, what I 17:13:29  
7 thought of them, what I thought was going on in some 17:13:41  
8 of the ads. Very -- I remember we spent, you know, 17:13:41  
9 five or ten minutes discussing a Camel ad that looked 17:13:44  
10 like a scene from the movie "Casablanca." We talked 17:13:49  
11 about why they may have done something like that. At 17:13:52  
12 least I talked -- you know, told him what I thought 17:13:55  
13 was going on and why it was going on that way. 17:13:57  
14 BY MR. RICHARDSON:  
15 Q. What -- what discussions did you have about 17:14:01  
16 the likely line of questioning? 17:14:02  
17 A. You know, that there would be -- you know, the 17:14:07  
18 focus was going to be on -- there was going to be a 17:14:09  
19 focus on the media plan. And, you know, what we were 17:14:13  
20 intending to do, and why we made this sort of -- why 17:14:18

21 we made the recommendations we made. How the budget 17:14:21  
22 was arrived at. What research techniques we used. 17:14:24  
23 Q. The ads that you referenced looking at, were 17:14:35  
24 there ads that we then subsequently reviewed today a 17:14:37  
25 part of the expert file? 17:14:42  
26 A. We didn't review them today, but there -- 17:14:44  
27 there -- all of the ads that we looked at were 17:14:47  
28 photocopies that have been made available to you as 17:14:50

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1 part of the expert file. 17:14:53  
2 MR. RICHARDSON: Okay. Go off the record. 17:15:19  
3 THE VIDEOGRAPHER: Just a moment. You want me 17:15:22  
4 to change the tape or just go off for a moment? 17:15:23  
5 MR. RICHARDSON: No, just go off. 17:15:26  
6 THE VIDEOGRAPHER: Off the record at 5:15 p.m. 17:15:28  
7 (Discussion off the record.)  
8 (Whereupon, at 5:15 p.m. the deposition  
9 adjourned.)

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15

16 I hereby declare under penalty of perjury  
17 that the foregoing deposition is my deposition under  
18 oath; that these are the questions asked of me and my  
19 answers thereto; that I have read my deposition and  
20 have made the necessary corrections, additions or  
21 changes to my answers that I deem necessary.

22

23 IN WITNESS THEREOF, I hereby subscribe my  
24 name, this \_\_\_\_\_ day of \_\_\_\_\_ 2000.

25

26

27

28

BRUCE G. SILVERMAN

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